80-347

NO.

FILED
SEP 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

FALL TERM 1980

DE JONG PACKING COMPANY,
Petitioner,

v.

UNITED STATES, THE SECRETARY OF AGRICULTURE AND THE PACKERS AND STOCKYARD ADMINISTRATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether application of a per se rule is proper under the antitrust provisions of the Packers & Stockyard Act to declare illegal Petitioner-Packing

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[1] De Jong Packing Company is the petitioner herein. Hygrade Food Products Corporation, Mt. Vernon Meat Company, and Ferry Bros., Inc. as well as De Jong Packing Company were the petitioners in the court below.

Company's concerted conduct to require stockyard auctions to sell slaughter cattle subject to the cattle's passing government inspection rather than "as is."

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DE JONG PACKING COMPANY,
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UNITED STATES, THE SECRETARY OF AGRICULTURE AND THE PACKERS AND STOCKYARD ADMINISTRATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
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STATEMENT OF REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 618 F.2d 1329. The administrative decision of the Judicial Officer of the Department of Agriculture is reported at 37 A.D. 1181 and the initial decision of the Administrative Law Judge is unreported. These decisions are found in the Appendix accompanying this Petition.

STATEMENT OF JURISDICTION

This petition is before this Court pursuant to 28 U.S.C. 1254(1) seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered April 7, 1980. The petition to that court for rehearing en banc was denied by order entered June 3, 1980.

STATUTORY PROVISIONS INVOLVED

Section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192 (1964), (amended 1976), provides in pertinent part:

> It shall be unlawful with respect to livestock, meats, meat food product, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> . . . .
>
> (e) Engage in any course of business or do any act for the purpose or with effect of manipulating or controlling prices or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

> (g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192 (a), (e), (g).

STATEMENT OF THE CASE

Petitioner, a Northwest Washington meat packer, is before this Court seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. That court in an Opinion rendered on April 7, 1980, with Judge Sneed dissenting, held that the Petitioner-packers below had violated section 202(a) of the Packers and Stockyard Act, 7 U.S.C. § 192(a) (hereinafter "the Act"), in undertaking concerted action to require auction markets to change terms of sale from "as is" sales of slaughter cattle, under which the packers bear the risk that the cattle will fail to pass government inspection, to sales subject to

the cattle's passing government inspection which place the risk of loss on the seller.[2] The court below denied a petition for rehearing with suggestion for rehearing en banc by order entered on June 3, 1980. De Jong Packing Company el al. v. United States et al., 618 F.2d 1329 (9th Cir. 1980).

---

[2]Section 202 of the Act, 7 U.S.C. § 192 (1964) (amended 1976), provides in pertinent part:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form . . . for any packer . . . to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or . . . (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or . . . (g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d) or (e) of this section.

The Packers and Stockyard Administrator instituted the original proceeding before a Department of Agriculture Administrative Law Judge as a result of a sequence of notices beginning in 1972 from the packer here (as well as other packers) directed to auction markets. The letters stated, in effect, that in the future the packers would purchase and pay for cattle only "subject to" their passing government inspection. The packers undertook this notification, as the Judicial Officer in the Administrative appeal below found, to combat an increased surreptitious use of antibiotics by farmers on their herds which allowed the farmers to send a greater number of sick animals to the markets which gave the appearance of being in good health only to be, with increasing frequency, condemned upon post-mortem inspection by health authorities. In re DeJong Packing

Company, et al., Decision of Judicial Officer, U.S. Dept. of Agriculture, 36 A.D. 1181, 1186-1192. (Hereinafter "Decision of Judicial Officer".)

Under the customary practices and marketing procedures of the Northwest Washington livestock auction markets, the purchase of livestock has been on an "as is" basis unless otherwise expressly specified prior to sale. When so purchased, the purchaser buys the animals as seen, assuming the risk of subsequently discovered defects which may have been masked by the drugs, and full payment is due within one business day of purchase. When slaughtered cattle are sold at an auction on a "subject" basis, the sale is contingent upon the animal passing federal inspection as being fit for human consumption, and payment is not due until one business day after the animal has passed

inspection. (Decision of Judicial Officer, 36 A.D. 1185.)

The first notice stating the position of the packers was sent to the auction markets in February of 1972. The auction markets promptly rejected the change in policy, and the Packers and Stockyards Administration sent warning letters to the packers. Sales continued on an "as is" basis and most packers acceded to those terms. Packer De Jong, however, refused to pay for any cattle subsequently condemned, and the Washington State Department of Agriculture initiated proceedings seeking to compel him to pay. De Jong prevailed under a state court ruling which the State Department of Agriculture declined to appeal, the state trial court holding that the auction markets were placed on notice as to the conditions under which De Jong would purchase and that the markets chose

to accept De Jong's bids on those conditions. (Decision of Judicial Officer, 36 A.D. at 1188-1189.)

After this decision, in April of 1974, each of the packers individually sent letters to the stockyards informing them again that in the future their bids would be subject to the cattle passing inspection and that payment would be delayed for three bank days pending determination as to whether the cattle were fit for human consumption. When these letters were received, all of the Northwest Washington livestock auction market owners, a number of area farmers, officials from the Packers and Stockyards Administration and the State of Washington Department of Agriculture, and national officials from the auction markets' marketing association met to formulate a uniform response. As a result of this meeting, they sent a form letter to the packers indicating that they would not

agree to any change in the "as is" marketing procedure. (Decision of Judicial Officer, 36 A.D. at 1190.) After a brief period of dispute, each of the packers notified the stockyards that they would buy on an "as is" basis, thus giving up their position. (Decision of Judicial Officer, 36 A.D. 1192.)

Nonetheless, the Packers and Stockyard Administrator commenced an administrative proceeding successfully seeking a "cease and desist" order before an administrative law judge. Both the Department and certain of the packers (including the Petitioner herein) appealed the initial decision to the Judicial Officer, the Department contending that the cease and desist order issued was insufficiently broad and the packers contending that no order should issue. The Judicial Officer sustained the law judge's findings of violations of Sections 202(a), (e) and (g), of that Act,

7 U.S.C. § 192(a), (e) and (g), and broadened the cease and desist order already entered. (Decision of Judicial Officer, 36 A.D. 1181 et seq.).

Certain of the packers sought review before the United States Court of Appeals for the Ninth Circuit pursuant to 7 U.S.C. § 194 and 29 U.S.C. § 2342. That court reversed the Judicial Officer's findings with respect to subsections (e) and (g), finding that the packers neither engaged in any pricefixing nor conspired to do any act made unlawful by the section. However, the court held, over Judge Sneed's dissent, that the packers, by their actions, had engaged in an unfair practice under subsection (a), and in that respect affirmed the

order of the Judicial Officer.[3] De Jong Packing Company et al. v. United States et al., 618 F.2d 1329 (1980), pet. for rehear. den., (1980).

ARGUMENT

The court of appeals majority found that the conduct of the packers was a violation of section 202(a) of the Act, because it fell squarely within the prohibition of Paramount Famous Lasky Corp. v.

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[3]The court below also found that there was substantial evidence of concerted action of the part of the packers and that the controversy was not moot. 618 F.2d at 1335, 1337-38. Petitioner does not contest these holdings. The court also held that the packers had violated Regulation § 201.43(b), 9 C.F.R. § 201.43(b) (1977). 618 F.2d at 1337. Petitioner does not concede that this finding is correct.

United States, 282 U.S. 30 (1930).[4] In so doing, the court below held that concerted conduct which seeks to set non-price terms of trade by refusal to deal is necessarily violative of the standard of Paramount and its companion case. Opinion 8-10. By classifying the conduct within this rule, the court below avoided judicial scrutiny of the actual pro-and anti-competitive effects of the conduct in question and thereby, as the dissent points out, in effect if not in name applied a per se rule to that conduct. 618 F.2d at 1338. This application of Paramount, petitioner

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[4] In relying on these cases, the majority properly looked to the "basic antitrust blueprint" of the Sherman Act and other antitrust legislation to interpret the standards of Section 202. 618 F.2d at 1335, n. 7, citing Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968).

submits, decides incorrectly important questions of federal law which have not been, but should be, settled by this Court.

The questions are whether Paramount Famous Lasky Corporation and First National Pictures in fact set forth a strict rule of per se analysis, and whether, in any event, such an analysis should be applied to the concerted conduct here which seeks to set non-price terms.

In Paramount Famous Lasky Corporation, a group of film distributors agreed to use a standard form contract which required arbitration of all disputes and not to deal with any exhibitor who breached that clause. The Court struck down this form of concerted action in a rather abbreviated opinion which Judge Friendly has recently described as "somewhat inscrutable" and as leaping to a result "[a]fter quoting from a miscellany of largely

irrelevant opinions about the purposes of the Sherman Act." Drayer v. Krasner, 572 F.2d 348, 354 (2d Cir. 1978). While there is some language, quoted by the majority here, that tends to support the proposition that every agreement which concertedly seeks to set non-price terms is unlawful, there is considerable language to suggest that the Court was instead striking down the particular type of clause in question, finding it "one that 'cannot be classed among those normal and usual agreements in restraint to trade or commerce' which, though restrictions of trade, are deemed reasonable and permissible." 282 U.S. at p. 30. Moreover, the Court went on to suggest that it was the unreasonable effect of the concerted action that made it impermissible:

> It may be that arbitration is well adapted to the needs of the motion picture industry, but when under the guise of arbitration parties entered

> into unusual arrangements which unreasonably suppress normal competition, their action is illegal.

Id.

Similarly, in First National Pictures, a companion case involving the same parties, the Court in a yet more abbreviated opinion struck down an agreement of film distributors imposing credit checks on exhibitors and allowing a joint credit committee to require a security deposit from exhibitors with low credit ratings. The Court very briefly alluded to the nature of the evil here:

> The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Board and secure their concerted action for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammeled market.

United States v. First National Pictures, Inc., 282 U.S. 44, 55 (1930). As the dissent points out:

> While this may imply disapproval of joint negotiations by the distributors, it also disapproves the restraint on the distributors' freedom to vary the terms of their contracts with exhibitors. The Court may therefore have been concerned about the limitation on competitive variations of suitable 'goods,' about the distributors' increased bargaining strength, or both.

618 F.2d at 1339-40, n. 1.

Thus, there is considerable question whether the Supreme Court in Paramount Famous Lasky Corp. or First National Pictures, Inc. was, in fact, ennunciating a per se rule, as the majority here concedes in a footnote to its opinion. 618 F.2d at 1335, n. 8. We would submit that these two cases to not require a strict rule striking down any and all agreements, including the concerted action herein, which seeks to set non-price terms. Rather they leave room for an application of the rule of reason, with due consideration of the effects of such agreements as the

dissent below would have had that court require.

Indeed, Judge Friendly in Drayer v. Krasner, 572 F.2d 348, 354-55 (2d Cir. 1978) declined to adopt any per se rule from Paramount Famous Lasky even in another case involving an arbitration clause and suggested that that court may well have been strongly influenced by the effect of the arbitration clause and of the potential monopoly position of the distributors. As he noted in his Opinion, both the court's statement of facts, and government briefs indicated that the arbitration clause had worked harshly on exhibitors. Judge Friendly also indicated that:

> a further factor which . . . must have lurked in the background was that many distributors themselves were important exhibitors and, indeed, were later found to have conspired with the goal of obtaining a monopoly in exhibition. [Citation omitted]

Id.

In addition Judge Friendly raised the implication that Paramount Famous Lasky might well have been a specific reaction to the then prevailing views with respect to arbitration. As the dissent below concluded with respect to the Drayer decision:

> In the light of these and related thoughts about the vitality of Paramount Famous Lasky, the Second Circuit held that a collective attempt to impose a standard arbitration clause which did not "inhibit the freedom of any firm in competing for business or of any investor in seeking the firm that will give him the best and cheapest service, . . . was within the rule of reason. . . ." Thus one circuit, at least, is unwilling to extrapolate from Paramount Famous Lasky even to all concerted efforts to impose arbitration clauses, to say nothing of other forms of joint negotiation.

618 F.2d at 1340 n. 1.

While the Second Circuit in Drayer questioned the vitality of the holding in Paramount Famous Lasky, Professor Sullivan approves its result. Nonetheless,

he, like the court in Drayer, cautions against the dangers in extrapolating from Paramount Famous Lasky and First National Pictures, or elsewhere, a rule which would strike down all concerted action to set trade terms through refusal to deal. L. Sullivan, Antitrust § 90, 256-259 (1977). (Hereinafter "Sullivan".) As he notes, these two decisions are often called boycott decisions. However, as he emphasizes, it is imperative to distinguish between the "classic boycott" in which competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context and other categories of concerted refusals to deal which are often also placed under the boycott umbrella. Sullivan at 256, 259.

The "classic boycott", see Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914), as

Professor Sullivan states, is almost invariably harmful to competition and therefore properly calls for a per se rule, while concertedly setting trade terms may aid or hurt competition and therefore would properly call for application of a rule of reason. Sullivan at 259. He explains the rationale for the differing rule for the latter category of cases:

> In some situations - for example if there are large numbers of small seller and buyers - an agreement fixing collateral terms, like an agreement standardizing product, might tend to increase price competition by reducing confusing variations between the offerings of competing sellers. In other situations concerted decisions about the terms on which competitors will trade may advance other social objectives and be competitively neutral. Though courts should look at all such arrangements critically, a per se response may be too severe.

Sullivan at 258.

Indeed a number of courts have declined to apply a per se rule and instead applied a rule of reason to concerted

conduct setting non-price terms or other refusals to deal where the facts do not fit the "classic boycott." See Worthen National Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973), cert. den., 415 U.S. 918 (1974); E.A. McQuade Tours, Inc. v. Consolidated Air Tours Manual Committee, 467 F.2d 178 (1972); Ruddy Brook Clothes, Inc. v. British & Foreign Marine Insurance Co., 195 F.2d 86 (7th Cir. 1952), cert. den., 344 U.S. 816 (1952); Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941 (E.D.Pa. 1968); and Molinas v. National Basketball Assoc., 190 F. Supp. 241 (S.D.N.Y. 1961).

Similarly, another panel of the court below in Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd. declined to include the concerted refusal to deal involved in that case within the per se rule of the (classic) group boycott cases

but rather required that the purpose and effect of the concerted conduct be examined. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969).[5]

In that decision, the court found that a per se rule was properly applied only when "there was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." 416 F.2d 71, 76.

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[5]The majority below summarily sought to make their decision consistent with Hawaiian Oke by suggesting that this case fell within its language. 618 F.2d at 336 citing Hawaiian Oke at 77. The language to which they referred was not part of the holding and suggested without explanation that a per se rule might be applicable when the primary purpose was to coerce the trade policies of third parties. As petitioner herein suggests above, while one effect of the packer's conduct might be to change the terms of trade of the stockyard auctions, their primary purpose was to put a halt to fraudulent practices.

Here, the packers indisputably had valid business reasons for their position, namely to seek a halt to fraudulent use of antibiotics which masked the condition of contaminated cattle at the time of sale. 36 A.D. 1181, 1192. Thus, as the Dissent suggests, on the present record it cannot be concluded that:

> the concerted activity of the packers, which the majority found to contravene section 202(a), served any such purpose. It is possible that "subject" terms would enhance competition with respect to the quality of animals offered for sale and reduce the costs of meat to consumers. It is also possible that they would be no more and no less anti-competitive than are "as is" terms. All we know for certain is that the farmers, stockyard owners, and the Department of Agriculture favor "as is" sales. The solidity of this front does not guarantee that its position is more competitive, or even less anti-competitive, than that favored by the packers.

618 F.2d at 1338. For these reasons, the dissent concludes that the Court should have

remanded this case to determine the pro- and anti-competitive effects of the packers conduct.

It is no answer to suggest, as does the majority below, that whether or not Paramount Famous Lasky and its companion case dictate a per se rule under the Sherman Act they can nonetheless, without analysis of purpose and effect, be read to dictate a strict rule under Section 202 of the Packers and Stockyards Act. 618 F.2d at 1335, n. 8. While it is true that this section may be read more broadly than the Sherman Act, Armour & Company v. United States, 402 F.2d 712 (7th Cir. 1968), also makes clear that where appropriate a rule of reason should apply:

> Surely words such as "unfair" and "unjustly" in Section 202(a) and "undue" and "unreasonable" in Section 202(b) require some examination of the seller's intent and the likely effects of its acts and practices under scrutiny, even though these tests under Section 202(a) and (b) be less stringent

> than under some of the antitrust laws. These adjectival qualifications expressed in the statutory language enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b).

402 F.2d at 717.

In view of this analysis the dissent concludes, and Petitioner here urges, that the view of the majority below "puts forward a reading of Paramount Famous Lasky and First National Pictures and an assessment of their places in antitrust jurisprudence that are highly questionable." 618 F.2d 1339, n. 1.

Because these historic decisions of this Court contain language which led the court below to apply, in effect, a per se rule to other concerted conduct seeking to set non-price terms, this case raises important questions of federal antitrust law which should be decided by this Court. Application of a strict rule without

systematic analysis can inevitably lead to distorted results, as Justice Stewart and Justice Harlan of this Court have previously indicated.

> It should be plain why there is a real danger of the abuse of the per se principal by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden.

Elman, Petrified Opinions and Competitive Realities, 66 Col. L. Rev. 625, 627 (1966) quoted in Albrecht v. Herald Co., 390 U.S. 145, 170 n. 2 (1968) (Stewart J., dissenting).

For these reasons, Petitioner De Jong asks this Court to grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FILED: June 3, 1980
RICHARD H. DEANE
CLERK, U.S. COURT
OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYGRADE FOOD PRODUCTS CORPORATION; DE JONG PACKING COMPANY, et al., Appellants, vs. UNITED STATES, THE SECRETARY OF AGRICULTURE AND THE PACKERS AND STOCKYARDS ADMINISTRATION, Appellees.	)	NO. 77-2722
	)	ORDER

Before: MERRILL and SNEED, Circuit Judges, and ZIRPOLI, District Judge

On the petition of De Jong Packing Company and Mt. Vernon Meat Company, Inc., for rehearing with suggestion for rehearing en banc, Judges Merrill and Zirpoli have voted to deny panel rehearing while Judge Sneed would grant panel rehearing. Judge Sneed has voted to reject the suggestion for rehearing en banc and Judges Merrill and Zirpoli have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

FILED: April 7, 1980
RICHARD H. DEANE
CLERK, U.S. COURT
OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DE JONG PACKING COMPANY, and MT. VERNON MEAT CO., INC., Petitioners, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.	NO. 77-2722
HYGRADE FOOD PRODUCTS CORPORATION, Petitioner, vs. THE UNITED STATES, THE SECRETARY OF AGRICULTURE and THE PACKERS AND STOCKYARDS ADMINISTRATION, Respondents.	NO. 77-2979 OPINION

On Petition to Review a Decision of the National Labor Relations Board

Before: MERRILL and SNEED, Circuit Judges, and ZIRPOLI,* District Judge

MERRILL: Circuit Judge:

* Honorable Alfonso J. Zirpoli, Senior United States District Judge of the Northern District of California, sitting by designation.

FACTS:

The Packers and Stockyards Administrator instituted this administrative action under the Packers and Stockyards Act ("the Act"), 7 U.S.C. §181 et seq., alleging violations of §202(a), (e) and (g) of the Act.[1] The complaint alleged that a group of packers, petitioners here, had conspired to force auction stockyards to change their terms of sale, from "as is" sales of slaughter cattle, under which the packers bear the risk that the cattle will fail to pass government inspection, to "subject" sales - those subject to the cattle's passing government inspection - which place the risk of loss on the seller.

The administrative law judge found that petitioners had violated the Act as charged and that petitioner De Jong had violated 9 C.F.R. §201.43(b) as well, and that appropriate cease and

desist orders should issue. The government, contending that the cease and desist order was insufficiently broad, appealed to the Judicial Officer, who has final authority to decide cases within the Department of Agriculture. Petitioners also appealed, contending that the cease and desist orders should not have issued. The Judicial Officer sustained all findings of violations. In addition, he concluded that all petitioners, not just De Jong, had violated 9 C.F.R. §201.43, because they had conspired with De Jong. Accordingly, he broadened the scope of the cease and desist order.[2] Petitioners have appealed to this court.

Under the customary trade practices and marketing procedures of the northwest Washington livestock auction markets, the purchase of livestock is on an "as is" basis unless otherwise expressly specified

prior to sale. When so purchased, the purchaser buys the animals as he sees them with no guarantee that they are suitable for any purpose. He assumes the risk of subsequently discovered defects, and full payment is due within one business day of purchase.

When slaughter cattle are sold at an auction market on a "subject" basis, the sale is contingent upon the animal passing federal inspection as fit for human consumption, and payment is not due until one business day after the animal has passed inspection.

It is not practicable or lawful to sell a particular animal at auction with some prospective buyers bidding on an "as is" basis, while others bid on "subject" terms. It is the responsibility of the stockyard owner to fix the terms of sale.[3] Under the practice at northwest Washington

auctions, cattle are very rarely sold on "subject" terms; only cattle with visible defects or which have elicited no "as is" bid are so sold.

In early February, 1972, petitioners, with the exception of Hygrade, signed a letter to the stockyards which stated that in the future petitioners would purchase and pay for cattle only subject to their passing government inspection.[4] The stockyards promptly rejected the proposed change in policy. On March 8 and 9, 1972, the Packers and Stockyards Administration sent letters to the packers advising them that it considered their actions to be in violation of the Act, and that it would take further administrative action if the stockyards did not "reconsider." All packers but petitioner De Jong appear to have reconsidered. Their purchase of cattle continued on an "as is" basis and

they promptly paid for all cattle purchased, in accordance with the practice. De Jong, however, refused to pay for any cattle sold to it which was subsequently condemned. The Washington State Department of Agriculture then initiated proceedings pursuant to the state's regulatory program, seeking to compel De Jong to pay. A state court found that De Jong had bought the cattle on "subject" terms and therefore, as a matter of contract law, was not required to pay.

Shortly after that decision became final, during April of 1974, each petitioner (now including Hygrade) sent a letter to the stockyards informing them that as of May 1, 1974 (in one case as of April 29, 1974), all bids would be subject to the cattle passing inspection, and that payment for cattle would be delayed for three bank days pending determination as to whether the cattle were fit for human

consumption. (Hygrade's letter varied only in specifying that it would implement this policy by withholding the average price of two animals for the three-day period.)

From May 1, 1974, to May 15, 1974, petitioners adhered to their announced position and no cattle were purchased "as is." During the last two weeks of May, 1974, however, all petitioners notified the stockyards that they were rescinding their "subject" policy and resumed bidding for cattle on an "as is" basis.

EVIDENCE OF CONSPIRACY

It is clear that bidding for cattle on a "subject" basis is perfectly legal, and that any packer acting independently is free to bid on such terms. If what was done here constituted a violation of §202, it was because concerted action was taken by petitioners. The existence of a conspiracy or agreement thus becomes critical.

Petitioners contend that the record does not support the Judicial Officer's finding of conspiracy. Our question on review is whether the finding is supported by substantial evidence. Corona Livestock Auction, Inc. v. United States Department of Agriculture, 607 F.2d 811 (9th Cir. 1979).

It is clear that a conspiracy existed as of February 8, 1972, when petitioners (absent Hygrade) joined in advising the stockyards that all future bids would be "subject" bids. As the Judicial Officer noted in his decision:

> "This case is quite unusual! 'Conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution.' United States v. Morris 225 F.2d 91, 95 (C.A. 7), certiorari denied, 350 U.S. 901."

The question, then, is whether a conspiracy existed in 1974, when petitioners individually notified the stockyards

that their bids would be confined to "subject" bids in the future. Petitioners assert that they all simultaneously and independently arrived at the decision to send their 1974 letters as a result of De Jong's success in Washington state courts. He noted that the state court success was founded on the state court finding that the livestock markets had accepted De Jong's bids knowing that they were "subject" bids. Thus, the co-operation of the livestock markets in continuing to accept "subject" bids was necessary to future success. The Judicial Officer stated:

> "* * * the State Court decision was not likely to make each of the respondents, acting independently, come to the conclusion that he alone could force the auction markets to change their sales policy effective May 1, 1974 (or April 29, 1974)."

As to whether a 1974 conspiracy existed, the Judicial Officer stated:

> "There is no evidence in this case that any of the conspirators withdrew from the conspiracy prior to mid-May 1974. Merely purchasing livestock in 1972 and 1973 without enforcing the terms of the February 1972 ultimatum is no evidence that the conspirators abandoned their conspiratorial purpose. In fact, I infer from their unity of action in 1974, following the State Court decision, that in 1972 and 1973, the respondents other than Hygrade were merely biding their time awaiting the outcome of De Jong's activities in furtherance of the conspiracy."

We find this inference to be rational. Further, the parallel action taken in 1974 lends support to the inference that it was in response to a conspiracy. The similarity of the letters written by the individual petitioners, the manner in which terms and conditions of purchase were stated by each, and the coincidence of the effective dates selected by each (April 29, and May 1, 1974), all lend credence to the view that each petitioner was aware of the action taken by the others and was acting in concert with the other petitioners. It is conceded that there was "trade talk," of

which petitioners were aware, regarding a boycott. While mere consciously parallel action is not sufficient to demonstrate conspiracy, neither is express agreement required, it is "enough that knowing that concerted action was contemplated or invited, [defendants] gave their adherence to the scheme and participated in it." Interstate Circuit Co. v. United States, 306 U.S. 208, 226 (1939). Accord, Bogosian v. Gulf Oil Corp. 561 F.2d 434, 446 (3d Cir. 1977), cert denied, 434 U.S. 1086 (1978); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 84-85 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965).

Here, from the facts that petitioners combined to seek "subject" terms in 1972 and waited to act together again in 1974,

it can be inferred that petitioners believed that concerted action was necessary to achieve their purpose, and that no petitioner would have acted as it did had it not believed that the others would do the same.

We conclude that as to all petitioners who joined in the 1972 notice to stockyards there is substantial evidence to support the finding that the 1972 conspiracy was not abandoned prior to 1974, and that the writing of the 1974 letters constituted concerted action taken pursuant to agreement.

As to Hygrade - the company that did not join in the 1972 letter - the Judicial Officer found that it "knowlingly and intentionally joined the conspiracy in 1974." He based his finding on the similarity between the conditions set forth in the Hygrade letter and those set forth

in the letters of the other petitioners,[5] and on the coincidence in timing.[6]

We conclude that there was substantial evidence to support the finding that Hygrade, in 1974, joined the ongoining conspiracy formed by the other petitioners in 1972.

UNFAIR PRACTICE UNDER SECTION 202(a)

The administrator alleged violations of subsections (a), (e) and (g) of §202 (see footnote 1).

As to subsection (g), petitioners assert that they have never conspired to do any act made unlawful by the section; that if they conspired at all, it was to do a perfectly lawful act - to bid only on "subject" terms. We agree and find no violation of subsection (g).

As to subsection (e), the alleged violation is apparently based on the

contention that the conspiracy, in effect, was to fix prices, the rationale apparently being that since the petitioners would only bid "subject," they were fixing prices of condemned cattle at zero. We cannot accept the notion that a conditional sale is an effort to fix prices. If the condition is not met, then no purchase takes place at all. The unfit cattle are not purchased at zero dollars; they are simply not purchased. Accordingly, we find no violation of subsection (e).

The problem is with subsection (a), and the question is whether this conspiracy constitutes an unfair practice under that subsection. The fact that the conspiracy is not a subsection (g) violation, and that absent concert of action "subject" bidding is not an unfair practice, does not provide an escape. A competitor "can do many things independently which he may not

combine with others to accomplish." Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 76. See Parke, Davis & Co. v. United States, 362 U.S. 29 (1960).[7] What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action; to obtain by concert of action market power not possessed by the purchasers individually and, by exercise of that market power, to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces.

Such conduct falls squarely within the prohibition of Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930), and United States v. First National Pictures, Inc., 282 U.S. 44 (1930).[8] In Paramount Famous Lasky Corp., a group of motion picture distributors agreed that

they would deal with exhibitors only on the terms of a standard exhibition contract which required arbitration of all disputes. The Court held that the "manifest purpose" of this arrangement was "to coerce the Exhibitor and limit the freedom of trade," and that the "necessary and inevitable" effect of such an agreement was the unreasonable restraint of competition. 282 U.S. at 41-42. The Court conceded that arbitration might be well suited to the needs of the film industry, but concluded that the statute could not

> "'* * * be evaded by good motives. The law in its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results.' Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49."

282 U.S. at 43-44. This is precisely what petitioners would have us do.

First National Pictures, Inc., involved the same parties; there, the distributors agreed to deal only with exhibitors who agreed to provide a security deposit as required by the standard contract and to assume any contractual obligations of the prior theater owner. The Court found that its decision in Paramount Famous Lasky Corp. was dispositive; it concluded that

> "The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunity to deal in a free and untrammeled market."

282 U.S. at 54.

The situation in the present case is indistinguishable able [sic]. Here, as in Paramount Famous Lasky Corp. and First National Pictures, Inc., a group of competitors have joined together for the purpose of coercing more favorable terms of

trade from third parties then they could obtain through the normal play of competitive forces.

In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, we drew a distinction between "normal and usual" agreements by which parties restrict their liberty to deal with others, which are permissible, and those with the "purpose to coerce the trade policies of third parties or to secure their removal from competition," which are not. 416 F.2d at 77 (citations omitted). Here, it was the clear and sole purpose of petitioners to exert a coercive influence upon the trade practices of third parties in order to exact more favorable terms than they could otherwise obtain. This the Judicial Officer could properly enjoin.

Petitioners contend that their two unsuccessful attempts to coerce a change in

marketing practices have demonstrated lack of market power on their part; that Paramount Famous Lasky Corp. and First National Pictures, Inc., are to be distinguished in that market power was clearly present in those cases; that without market power no adverse effect on competition is to be expected, and that for this reason a cease and desist order should not have been entered here.

Initially, we note that there may have been reasons for the failure of petitioners' coercive efforts other than lack of market power. However, even assuming that petitioners lacked market power, and even were we to conclude that petitioners' lack of market power would preclude our finding that they had violated the Sherman Act, the cease and desist order under §202 was proper.

The consequences of violation of the Sherman and Clayton Acts are far more

substantial than here, where the issue is simply whether the practice in question should be halted.

The question would seem to be whether, under the Act, a practice cannot be halted as unfair under §202 unless competitive harm has already occurred, or whether the likelihood that harm will result suffices. This question we did not reach in Corona Livestock Auction, Inc. v. United States Department of Agriculture, supra, 607 F.2d 811 (9th Cir. 1979); or Central Coast Meats, Inc. v. United States Department of Agriculture, 541 F.2d 1325 (9th Cir. 1976).

The government contends that the purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered; that unfair practices under §202 are not confined to those where competitive injury has already

resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition. We agree. See Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961). Cf. FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966); FTC v. Motion Picture Adv. Co., 344 U.S. 392, 394-95 (1952). It would make little sense and might prove disruptive of the market to hold that petitioners may continue to repeat their concerted efforts to coerce a change in market practices and may be halted only when they have finally acquired sufficient market power to succeed.

We affirm the Judicial Officer's conclusion that petitioners engaged in an unfair trade practice in violation of §201(a) of the Act, 7 U.S.C. §192(a).

REGULATION 201.43(b)

Petitioners contend that the Judicial Officer erred in ruling that De Jong had violated Regulation 201.43(b) by failing to pay for condemned cattle within one business day following sale, and that the other petitioners, as De Jong's coconspirators, had likewise violated the regulation. They contend that the Washington state court proceedings had established that the sale in question was a "subject" sale, and that when it had been determined that the livestock were unfit no obligation to pay arose. However, that decision was based on the state's regulatory program rather than the federal program and the federal government was not party to the state court proceedings; it in no sense had a "laboring oar" in those proceedings. See Montana v. United States, 99 S.Ct. 970, 974 (1979). Thus, neither claim nor issue

preclusion resulted. Cf. Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967). We have already ruled that substantial evidence supports the Judicial Officer's findings of conspiracy.

As to whether the sales in question were "as is" or "subject" the administrative law judge and the Judicial Officer found them to be "as is"; they found that all markets involved had rejected the 1972 letter and had followed their regular practice of selling "as is." The Judicial Officer concluded that since, under the Act, it is the market operator who has the responsibility for fixing the terms of sale and market practices (see footnote 3), a purchaser cannot unilaterally impose his conditions of sale without consent or approval of the market operator. He stated:

> "If the State Court's decision were sound, it would destroy the public livestock marketing system. Under the State Court's decision, each buyer could establish the terms and conditions relating to his purchase of animals at an auction stockyard merely by advising the market of such terms and conditions, notwithstanding the market's refusal to accept such terms.
> * * *
> * * * *
> Accordingly, when a stockyard owner-market operator establishes that cattle are sold 'as is' at his market, any packer who bids on cattle at that market is buying the cattle 'as is'; * * *."

We find substantial evidence to support the Judicial Officer's findings and agree with his conclusions.

OTHER CONTENTIONS

We find no merit in petitioners' contention that their withdrawal of their 1974 letters rendered the dispute moot. As the Supreme Court stated in United States v. W.T. Grant Co., 345 U.S. 629, 633 (1952), a case involving regulation by the Federal Trade Commission:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and decide the case. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." (Emphasis added.)

Accord, Oregon Washington Plywood Co. v. FTC, 194 F.2d 48, 51 (9th Cir. 1952). There is substantial evidence to support the conclusion that petitioners did not meet this heavy burden.

We find no merit in Hygrade's contention that as to it the cease and desist order, being nation-wide in scope, was unnecessarily broad. As the Judicial Officer noted in his decision, it is common practice under the Act to make cease and desist orders nation-wide in scope. This practice was upheld in Wilson v. Co. v. Benson, supra, 286 F.2d at 896. In our

view, if a packer has engaged in an unfair practice which should be halted, it is not unreasonable to make the order as broad as the packer's operations.

The order is affirmed.

FOOTNOTES

1. (Page 1) Section 202 of the Act, 7 U.S.C. §192 (1964) (amended 1976), provides in pertinent part:

> "It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form * * * for any packer * * * to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or
>
> * * * *
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or
>
> * * * *
>
> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a)-(d) or (e) of this section."

The administrator also alleged violation of §201.43(b) of the Regulations, 9 C.F.R. §201.43(b) (1977) (amended 1977), which provides in pertinent part:

> "Purchasers to pay promptly for livestock. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. * * *"

Violation was also charged of two other regulations prohibiting the furnishing of information to competitive buyers, and the restriction or limitation of competition. On appeal, these have been treated as encompassed within the statutory violation.

2. (Page 2) The Judicial Officer's order provides:

"Respondents DeJong Packing Company, Ferry Bros., Inc., Hygrade Food Products Corporation, Mount Vernon Meat Co., Inc., and John F. Lenz, their officers, directors, agents, employees, successors, and assigns, directly or indirectly, individually or in combination with others, or through any corporate or other device, in connection with their operations as packers, shall cease and desist from:

1. Entering into or acting in furtherance of any conspiracy, combination, agreement or arrangement with any other packer or livestock buyer for the purpose or with the effect of establishing or imposing any terms or conditions relating to the purchase of or the payment for livestock purchased in commerce.

2. Conducting any of its operations relating to the purchase of livestock in commerce jointly or in combination with any other packer or livestock buyer, or furnishing any information of such buying operations to any other packer or livestock buyer.

3. Failing to pay, when due, the full purchase price of livestock purchased in commerce. This order shall become effective as to each respondent on the first day after service upon such respondent."

3. (Page 3) 7 U.S.C. §208(b) (Supp. 1979) provides in part:

> "It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market."

4. (Page 3) As to this letter, the administrative law judge stated in his initial decision:

> "The obvious tenor of the document is threatening and coercive. * * * The meaning of the document was not unclear to the recipient markets. They understood it to be what it was--an ultimatum by their major customers. Without the patronage of these customers, the markets could not profitably conduct their business. Upon receipt of this ultimatum, it is no wonder that the markets sought Government aid in order to resist."

Petitioners allege that they took this action in response to the increasingly common practice on the part of some sellers of administering antibiotics so that

diseased cattle which will not pass government inspection appear to be healthy at the time of auction. The market operators opposed the shift to "subject" terms, asserting that it would cause added administrative problems and expense to the market. The Judicial Officer found that "each group had valid business reasons for its position * * *."

5. (Page 7) The Judicial Officer stated:

> "1. Both letters applied only to cattle (although Hygrade purchases other species).
> 2. Under both letters, all cattle would be purchased 'subject' rather than 'as is.'
> 3. Both letters provided that the packer would refuse to pay for an animal found unfit for human consumption if slaughtered within the identical time period, viz., three bank days; and both provided for the packer to pay for condemned animals slaughtered after such period.
> 4. Both letters provided for notice of condemnation by telephone, with condemnation slips to be thereafter mailed to the auction markets.
> The only difference between the purchasing conditions of the two

letters was in the method of payment. Hygrade would have withheld payment of only two animals from each sale until it was determined whether any animals failed to pass inspection; * * * whereas the other respondents would have withheld payment for all cattle for three bank business days."

6. (Page 7) The Judicial Officer stated:

"3. Hygrade's letter was sent practically simultaneously with the letters of the other respondents in 1974, and all of the letters had the identical effective date, May 1, 1974, except for Ferry, which had an April 29, 1974, effective date. Respondents contend that they all simultaneously and independently arrived at the decision to send their 1974 letters as a result of the State Court decision referred to in Findings 11, 12 and 19, supra. But it is not likely that such uniformity in timing would have occurred absent collective action. The State Court decision was filed February 15, 1974. The time for appeal expired about March 18, 1974. Although the beginning of a month might have been picked by each respondent, acting independently, as the effective date for action, not one of the respondents picked April 1, 1974, as the effective date, and not one picked June 1, 1974, or thereafter as the effective date."

7. (Page 8) While §202 of the Packers and Stockyards Act may have been made

broader than antecent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the Fair Trade Commission Act. See Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968); Swift & Co. v. United States, supra, 393 F.2d 247 (7th Cir. 1968); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968). Thus the courts that have considered §202 in some cases proscribes practices which the Sherman Act would permit. E.g., Armour & Co. v. United States, supra, 402 F.2d 712 (7th Cir. 1968); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962). The parties in the present case agree, as indeed they must, that decisions under the Sherman Act are germane to the issues before us.

8. (Page 8) The Supreme Court did not indicate in Paramount Famous Lasky Corp. or First National Pictures, Inc., whether it was proceeding under the rule of reason or whether it deemed the practices in question illegal per se. The court used language which suggests a rule-of-reason analysis and it also used language which suggests a per-se approach.

We do not find it necessary to decide that question here or to suggest which mode of analysis should apply under the Sherman Act. The present Act, as we discuss later, is, if anything, broader in scope than the Sherman Act, and conduct of the kind held improper in Paramount and First National would clearly justify issuance of a cease and desist order under §202.

FILED: April 7, 1980
RICHARD H. DEANE
CLERK, U.S. COURT
OF APPEALS

De Jong Packing Company, et al. v. The United States Department of Agriculture - No. 77-2722

Hygrade Good Products Corporation v. The United States, et al. - No. 77-2979

SNEED, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's opinion with the exception of that portion that finds a violation of section 202(a) of the Act, 7 U.S.C. §192 (1964). As to this portion I would remand to the Administrator to determine the pro- and anti-competitive effects of the packers' conduct the majority finds to amount to an "unfair, unjustly discriminatory, or deceptive practice or device in commerce."

Courts in dealing with matters requiring application of the antitrust laws frequently resort to per se rules or their functional equivalent as has the majority

in this case. One can speculate on the reasons for this tendency. Whatever the full array of reasons might be, one which surely is among the foremost is the desire to si plify the administration of the antitrust laws by the courts. The difficulty with zealous pursuit of this end is that often it results in judicial indifference to the actual economic effect of the practice branded with the per se iron.

I believe the majority's section 202(a) holding reflects this indifference. Concerted activity alone is not a per se violation of the antitrust law. Whether it is or not depends on its purpose and effect. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), established this principle for this circuit. The proscribed purposes were there described as "either to exclude a person or group from the market, or to

accomplish some other anti-competitive objective, or both. Id. at 76. On this record I can not say that the concerted activity of the packers, which the majority found to contravene section 202(a), served any such purpose. It is possible that "subject" terms would enhance competition with respect to the quality of animals offered for sale and reduce the costs of meat to consumers. It is also possible that they would be no more and no less anti-competitive than are "as is" terms. All we know for certain is that the farmers, stockyard owners, and the Department of Agriculture favor "as is" sales. The solidity of this front does not guarantee that its position is more competitive, or even less anti-competitive, than that favored by the packers.

The approach I suggest is not contrary to the authorities. This dissent shall not be lengthened by a critical analysis of the

numerous relevant cases. In the margin are set out some authorities and sources that give support to the approach I believe should have been taken in this case as well as a brief analysis of Paramount Famous Lasky Corp. v. United States, 282 U.S. 306 (1930), and United States v. First National Pictures, Inc., 282 U.S. 44 (1930), that suggests these venerable oaks in the anti-trust forest do not stand in the way of the direction I think we should have gone.1/

FOOTNOTE

1. A tidy constellation of Supreme Court decisions stands for the proposition that group boycotts are per se illegal. United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959);

Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948); see also L. Sullivan, Antitrust 229-30 (1977); R. Posner, Antitrust Law: An Economic Perspective 207 (1976); von Kalinowski, 11 Antitrust Laws and Trade Regulations ¶ 76.01, at 76-1 to 76-2 (1969); Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Comment, Per Se Illegality and Concerted Refusals to Deal, 13 B.C. Ind. & Com. L. Rev. 484 (1972). If every group refusal to deal were a boycott, then all attempts to pool bargaining power would fall under the per se prohibition, for a group bargaining posture necessarily depends on overt or implicit threats of group refusal to deal. In a number of decisions, however, the Court has indicated that the concept of unlawful boycott does not extend so far. Fashion Originators'

Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). Further retreat from peremptory condemnation of the concerted refusal to deal seems inevitable given the unexplored range of differently motivated practices that would otherwise be outlawed. For a discussion of some joint activities yet to be examined by the courts, see L. Sullivan, supra, at 247-311.

Paramount Famous Lasky Corp. v. United States, supra, and United States v. First Nat'l Pictures, Inc., supra, both decided under the Sherman Act, convince the majority that it is an antitrust violation for competitors jointly to exact more favorable terms of trade from their suppliers than

they could otherwise obtain "through the normal play of competitive forces." Opinion at 9. The majority applies the principle just stated to the packers' conduct. This of course assumes that the conduct deviated from the competitive norm, but more importantly, it puts forward a reading of Paramount Famous Lasky and First National Pictures, and an assessment of their place in antitrust jurisprudence, that are highly questionable.

Neither Paramount Famous Lasky nor First National Pictures uses the term "boycott" or explicitly applies a per se rule. Indeed, Mr. Justice McReynolds' opinions for the Court in these cases are hardly specific in their criticism of the condemned joint activities. Judge Friendly has recently described the "somewhat inscrutable opinion" in Paramount Famous Lasky as leaping to a result "[a]fter quoting from a miscellany of largely

irrelevant opinions about the purposes of the Sherman Act." Drayer v. Krasner, 572 F.2d 348, 354 (2d Cir. 1978). Film distributors in Paramount Famous Lasky agreed to use a standard contract form in dealing with exhibitors and not to deal with any exhibitor who breached the form's arbitration clause. The clause was the focus of the parties' and the Court's attention. The opinion does not emphasize the combination by the distributors at all. It stresses instead that the contract "cannot be classed among 'those normal and usual agreements in aid of trade and commerce'" which, though restraints of trade, are deemed reasonable and permissible. 282 U.S. at 30; cf. Drayer v. Krasner, supra, 572 F.2d at 355 (suggesting that the Court's generally low opinion of arbitration at the time may account for the result). Nevertheless, Mr. Justice McReynolds went on to shift the blame from

arbitration as such to its anti-competitive effect in this setting. "It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action is illegal." Id. Although this hints that the Court saw a weakening of competition not in the mere pooling of the distributors' bargaining power but in the design of this particular arbitration clause, the opinion goes no further. Judge Friendly offers the following hypothesis:

> The details of the arbitration clause. . . were indeed harsh and had operated harshly on exhibitors, as revealed in the Court's statement of the facts, 282 U.S. at 37-41, 51 S. Ct. 42, and further in the Government's brief, see 282 U.S. at 35-36, 51 S. Ct. 42. A further factor which, although not mentioned, must have lurked in the background, was that many of the distributors themselves were important exhibitors and, indeed, were later found to have conspired with the goal of attaining a monopoly in

> exhibition, see United States v. Paramount Pictures, Inc., 334 U.S. 131, 167-71, 68 S. Ct. 915, 92 L.Ed. 1260 (1948).

Drayer v. Krasner, supra, 572 F.2d at 354-55.

First National Pictures dealt with a similar agreement of film distributors to impose a credit check on exhibitors. The agreement allowed a credit committee appointed by the distributors to exact a security deposit from exhibitors with low credit ratings. The Court explained the evil of this combination very briefly:

> The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunilty to deal in a free and untrammeled market.

282 U.S. at 54. While this may imply disapproval of joint negotiation by the distributors, it also disapproves the restraint on distributors' freedom to vary

the terms of their contracts with exhibitors. The Court may therefore have been concerned about the limitation on competitive variations of substitutable "goods," about the distributors' increased bargaining strength, or both.

Professor Sullivan comments:

> Arrangements like those in Famous Lasky and First National are more like price fixing agreements than they are like classic boycotts. Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a "boycott" because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agreement would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion. But there is an even more important reason for not referring to an agreement which concertedly sets non-price terms of trade as a boycott, to which the per se doctrine applies. Such agreements may not be as consistently adverse to competition as their price fixing agreements or classic boycotts. In some situations--for example if there are large numbers of small sellers and buyers--an agreement fixing collateral terms, like an agreement standardizing product, might tend to increase

> price competition by reducing confusing variations between the offerings of competing sellers. In other situations concerted decisions about the terms on which competitors will trade may advance other social objectives and be competitively neutral. Though courts should look at all such arrangements critically, a per se response may be too severe.

L. Sullivan, supra, at 257-58 (footnote omitted); see also R. Posner, supra, at 207-08.

In the light of these and related thoughts about the vitality of Paramount Famous Lasky, the Second Circuit held that a collective attempt to impose a standard arbitration clause, which did not "inhibit the freedom of any firm in competing for business or of any investor in seeking the firm that will give him the best and cheapest service," Drayer v. Krasner, supra, 572 F.2d at 354, was "within the rule of reason," id. at 355. Thus one circuit, at least, is

unwilling to extrapolate from Paramount Famous Lasky even to all concerted efforts to impose arbitration clauses, to say nothing of other forms of joint negotiation.

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE

In re DE JONG PACKING COMPANY, et al.
P&S Docket No. 5087.
Decided June 30, 1977.

Slaughter cattle - sales conditions of - Unfair practice - failure to pay - group boycott - Unlawful conspiracy - entering into - Acts in furtherance of conspiracy - responsibility for - Information - furnishing of to competitive buyers in violation of Section 201.69 of the regulations

Where respondents engaged in unfair practices and participated in an unlawful conspiracy as found herein, each of the respondents violated the Act and the regulations issued thereunder. Each respondent is ordered to cease and desist from said violations as set forth in the Order herein.

PACKERS AND STOCKYARDS ACT, 1921
Cite as 36 A.D. 1181

Victor W. Palmer, Administrative Law Judge.
Rodney J. Streff, for complainant.
Peter Jay Visser, Lynden, WA, for respondents DeJong, Ferry Brothers, and Mount Vernon Meat Co., Inc.
Charles T. Cole, Stanwood, WA, for respondent John F. Lenz.
James F. Henriot, Stanwood, WA, for respondent Hygrade Food Products Corporation.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), charging 11 meat packers with conspiring to force auction stockyards in Northwest Washington to change their method of selling cattle from "as is," under which packers bear the risk of condemnations, to "subject" (i.e., subject to passing Government meat inspection), under which cattle sellers bear the risk of condemnations.

Four of the original 11 respondents consented to cease and desist orders, and a fifth cease and desist order was issued against a respondent who failed to file an answer. The complaint was dismissed as to one respondent because a new corporation was formed with different ownership.

After an administrative hearing was held with respect to the remaining five

meat packers, Administrative Law Judge Victor W. Palmer filed an initial decision on January 25, 1977, in which he found that the five respondents entered into an unlawful conspiracy, as charged. However, the complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to the Administrative Procedure Act (38 F.R. 10795; 42 F.R. 4395),[1] contending that the orders issued by Judge Palmer were not sufficiently

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[1]The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reeorganization (sic) Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

broad. Four of the five respondents involved in the administrative proceeding also appealed to the Judicial Officer contending that no cease and desist orders should have been issued. No appeal was filed by one respondent who participated in the administrative hearing, John F. Lenz, d/b/a Schenk Packing Co., and he filed no response to complainant's appeal.

Three of the four respondents filing appeals filed a joint appeal and brief (DeJong Packing Company, Mount Vernon Meat Co., Inc., and Ferry Bros., Inc.) in which they "accept the Findings of Fact as found by Judge Palmer" (Appeal, p. 4). A separate appeal was filed by Hygrade Food Products Corporation, in which Hygrade does not challenge Judge Palmer's findings of fact (Appeal, p. 3). Similarly, complainant does not challenge Judge Palmer's findings of fact. Accordingly, Judge Palmer's findings of fact (Findings 1-14,

infra) are adopted and set forth verbatim herein, except that I have added footnote 2 to Finding 9(a) and have changed December 29, 1974, in the first sentence of Finding 11 to December 29, 1972. In addition, I have added Findings 15-20, infra.

I agree with complainant that Judge Palmer's orders are not sufficiently broad and, therefore, my order is identical to the orders proposed by complainant and previously issued against the five respon-. dents who consented or defaulted. The orders issued against the five consenting or defaulting packers required the packers and their officers, directors, agents, employees, successors, and assigns, directly or indirectly, individually or in combination with others, or through any corporate or other device, in connection with their operations as packers, to cease and desist from:

1. Entering into or acting in furtherance of any conspiracy, combination, agreement or arrangement with any other packer or livestock buyer for the purpose or with the effect of establishing or imposing any terms or conditions relating to the purchase of or the payment for livestock purchased in commerce.

2. Conducting any of its operations relating to the purchase of livestock in commerce jointly or in combination with any other packer or livestock buyer, or furnishing any information of such buying operations to any other packer or livestock buyer.

3. Failing to pay, when due, the full purchase price of livestock purchased in commerce.

FINDINGS OF FACT

(1) (a) Respondent DeJong is a corporation organized and existing under the laws of the State of Washington. Its principal place of business is located at its Lynden, Washington business address: P. O. Box 513, Lynden, Washington 98264.

(b) Respondent Ferry is a corporation organized and existing under the laws of the State of Washington. Its principal

place of business is located at its Ferndale, Washington business address: P. O. Box 151, Ferndale, Washington 98248.

(c) Respondent Hygrade is a corporation organized and existing under the laws of the State of New York. Additional to its main headquarters in Detroit, Michigan, it has a principal place of business in Tacoma, Washington. The respective addresses are: P. O. Box 4771, Detroit, Michigan 48219, and 1623 East J St., Tacoma, Washington 98401.

(d) Respondent Mount Vernon is a corporation organized and existing under the laws of the State of Washington. Its principal place of business is located at its Mount Vernon, Washington business address: 1327-D McLean Rd., Mount Vernon, Washington 98273.

(e) Respondent John F. Lenz is an individual who did business as Schenk Packing Co. until October of 1974 and since

that time has done business as Schenk Packing Co., Inc. His principal place of business is located at his Stanwood, Washington business address: P. O. Box 576, Stanwood, Washington 98292.

2. Respondents DeJong, Ferry, Mount Vernon, Hygrade, and Lenz are now and at all times material herein were meat packers within the meaning and subject to the Act, buying livestock in commerce for purposes of slaughter and engaged in manufacturing or preparing livestock products for sale or shipment in commerce.

3. Burlington Sales Pavilion, Inc., stockyard, Burlington, Washington; Enumclaw Sales Pavilion stockyard, Enumclaw, Washington; Farmers Auction stockyard, Everson, Washington; Lynden Auction Market, Inc., stockyard, Lynden, Washington; Marysville Livestock Auction, Inc., stockyard, Marysville, Washington; Snohomish Auction Market

stockyard, Snohomish, Washington; and Tacoma Livestock Market stockyard, Spanaway, Washington, are now and at all times material herein were (1) stockyards posted under and subject to the provisions of the Act and (2) registered with the Secretary of Agriculture as market agencies selling livestock on a commission basis. Each is a privately owned and operated business subject to governmental regulation located in Northwest Washington which functions as a selling agent for consignors of livestock for sale by public auction at the stockyard. Hereinafter they will initially be referred to as the "Northwest Washington livestock auction markets" and, alternatively, as "the markets," "the auction yards," "the auction markets" and "the stockyards-market agencies."

4. Under the customary trade practices and marketing procedures of the Northwest Washington livestock auction markets,

which accord with prevalent practices and procedures at livestock auction markets throughout the United States, the purchase of livestock is on an "as is" basis, and full payment is due within one business day of purchase, unless otherwise expressly specified by auction market personnel prior to the sale of an animal in accordance with a different and express agreement reached previous to the sale.

5. When animals are sold by an auction (sic) market on an "as is" basis, the purchaser buys the animals as he sees them with no guaranty that they are suitable for any purpose and he assumes the risk of subsequently discovered defects.

6. When animals are sold at an auction market on a "subject" basis, the sale is contingent upon the animal meeting specified criteria (e.g. fit for human consumption, fit for dairy production). Should the animal fail to meet the specified "subject" criteria, there is no sale and

the purchaser is not required to pay the seller for the animal.

7. When cattle for slaughter are sold "subject," the sale is contingent upon their passing federal inspection as being fit for human consumption and full payment is due within one business day after the animal has passed federal inspection. Such subject sales occur whenever the consignor has so directed or has not withheld permission from the market operator to offer the consigned animal in this manner and the market operator exercises such discretion in response to requests from prospective purchasers or in furtherance of the practice of auction markets in Northwest Washington to call attention to any defects in animals of which they are aware at the time of sale.

8. During the period February 1972 through May 1974, respondents were regular purchasers at the Northwest Washington live-

stock auction markets as follows (CX 34):

Stockyard-Market Agency
Farmers Auction
Everson, Washington
Snohomish Auction Market
Snohomish, Washington
Tacoma Livestock Market
Spanaway, Washington
Stockyard-Market Agency
Enumclaw Sales Pavilion
Enumclaw Washington
Burlington Sales Pavilion, Inc.
Burlington, Washington
Lynden Auction Market, Inc.
Lynden, Washington
Marysville Livestock Auction, Inc.
Marysville, Washington
Regular Packer Purchasers
DeJong, Ferry, Mount Vernon,
Schenk (Lenz), & Kratzig
DeJong, Hygrade, Mount Vernon,
Schenk (Lenz), McRae, Thorp,
Hygrade, Schenk (Lenz)
Regular Packer Purchasers
Hygrade, Schenk (Lenz)
Mount Vernon
DeJong, Ferry, Mount Vernon,
Schenk (Lenz), McRae
DeJong, Ferry, Mount Vernon,
Schenk (Lenz), McRae
DeJong, Ferry, Mount Vernon,
Hygrade, Schenk (Lenz)
McRae, Kratzig, Thorp

Buyers for respondents purchased a large percentage of the slaughter cattle sold at these auction markets and their attendance at the sales was considered

necessary by the markets for their operations to be profitable. In addition to slaughter cattle, the markets also sold calves, dairy cattle, and other kinds of livestock.

9. (a) During the period February 8, 1972, to February 15, 1972, each respondent, individually or through its authorized representatives, with the exception of respondent Hygrade, signed a written document (CX 2) which stated, in essence, that all bids for slaughter cattle by respondents would thereafter be subject to the condition that the animal be found after slaughter to be fit for human consumption by appropriate Government inspectors, and that, beginning March 1, 1972, payment for each animal would be delayed until the close of the third bank business day following the date when it was bid upon, at which time payment would be made if the animal had been found fit for human consump-

tion after slaughter or had not yet been slaughtered, and no payment would be made for any of such livestock found to be unfit for human consumption. Shortly after the written document was signed, copies were sent to all of the stockyards-market agencies except Tacoma Livestock Market.[2]

(b) On February 23, 1972, Marysville Livestock Auction, Inc., sent letters to each signatory of CX 2 in which it rejected the proposed purchasing policy and denounced it as an open violation of the Act (CX 3). The owner of Farmers Auction informed some of the packers shortly after receiving CX 2 that he would not, as a general rule, sell livestock to them on a subject basis. All of Farmers Auction's

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[2]Complainant tried unsuccessfully to refresh the memory of the operator of the Tacoma Livestock Market by showing him a copy of his prior affidavit, which apparently indicated that he also received a copy of the written document (CX 2) in 1972 (Tr. 321-324).

literature and forms including buyers' invoices, indicated that all sales were "as is." Farmers Auction also had a sign posted at the sales ring specifying that all guarantees of livestock were between buyer and seller and that all sales, unless otherwise specified, were "as is." Lynden Auction Market, Inc., did not accept the terms of CX 2, called Mr. Hoskin of the Packers and Stockyards Administration in Portland, Oregon, to report its receipt, continued to rely on a sign posted in the auction ring stating that all sales were on an "as is" basis, and was under the impression that its sales were on an "as is" basis. There is no evidence that Lynden Auction Market made any other effort to communicate its rejection of the proposal to the packers prior to conversations it had with DeJong sometime subsequent to July of 1972.

Burlington Sales Pavilion, Inc., refused to accept the terms of the 1972

subject basis letter (CX 2) and had signs to the effect that all cattle were sold on an "as is" basis. An announcement was made prior to the sale of a particular animal if it was going to be sold "subject." There is no evidence that Burlington Sales Pavilion, Inc., made any other effort to communicate its rejection of the proposal to the packers. At Snohomish Auction Market, if an animal were to be sold subject, a specific announcement to that effect was made. There is no evidence that Snohomish Auction Market made any other effort to communicate its rejection of the proposal to the packers.

(c) On March 8 and 9, 1972, the Packers and Stockyards Administration sent letters to the respondents who signed CX 2 advising them that it considered their arrangement to be a violation of the Act and that further administrative action in this regard

would be necessary if they did not "reconsider" such arrangement (CX 4-9). The letters from the Packers and Stockyards Administration did not request written responses from respondents (CX 4-9).

(d) From February 1972 through the end of March 1974, none of the respondents other than DeJong attempted to buy cattle on a "subject" basis except as they had done traditionally (particular animals with visible defects, or which had elicited no or very low bids when offered "as is," etc.), did not attempt to implement the policy outlined in CX 2 and paid for all cattle purchased at the respective Northwest Washington livestock auction markets.

(e) Respondent Lenz, during the period Feburarty 1972 through the end of March 1974, complied fully with terms of "reconsideration" expressed in the Hoskin's letter to him (CX 7); purchased all livestock on an "as is" basis (Tr. 251, 327, 370, 487,

516, 583-84, 586, 597-98, 773); made timely payment for all cattle purchased (Tr. 251, 327, 402, 516, 736) and communicated no request, requirement or suggestion to any auction yard, other than his signing of CX 2, that he be allowed to purchase on a subject basis (Tr. 345, 370, 388, 404-05, 515, 584, 610, 733). However, see finding 13(b), infra.

10. (a) Respondent DeJong failed to pay for the following purchases of cattle found after slaughter to be unfit for human consumption:

Date of Purchase	Purchased at	Weight of Cow (lbs.)	Purchase Price
5/30/72	Marysville Livestock Auction	1055	$189.90
7/11/72	Marysville Livestock Auction	1080	237.60
7/13/72	Snohomish Auction Market	860	146.20

Date of Purchase	Purchased at	Weight of Cow (lbs.)	Purchase Price
7/25/72	Lynden Auction Market	1230	$280.44
8/1/72	Marysville Livestock Auction	880	178.64
8/8/72	Marysville Livestock Auction	1190	249.90
9/19/72	Lynden Auction Market	1255	252.25
10/3/72	Lynden Auction Market	1285	300.69
11/9/72	Snohomish Auction Market	1500	355.50
11/9/72	Farmers Auction	1290	251.55
3/13/73	Lynden Auction Market	925	185.00

In each of these transactions, the respective market paid the animal's consignor, even though the purchaser failed to pay

the market for the livestock (Tr. 36, 131-32, 200-02, 464-67, 534-35).

(b) On June 16 and October 18, 1972, Marysville Livestock Auction, Inc., sent statements to respondent DeJong seeking payment for the aforesaid cattle purchases on May 30, July 11, August 1 and August 8, 1972 (CX 10, 11). By letters dated July 7, July 20 and August 14, 1972, Marysville Livestock Auction, Inc., notified the Packers and Stockyards Administration of respondent DeJong's failure to pay for these cattle purchases (CX 12). Farmers Auction notified the Packers and Stockyards Administration of DeJong's failure to pay for livestock purchased at its stockyard (Tr. 132).

(c) By letters dated July 11, 1972, and January 30, 1973, the Packers and Stockyards Administration advised respondent DeJong that its failure to pay for

livestock purchased at the stockyards owned by Marysville Livestock Auction, Inc., and Farmers Auction constituted violations of the Act and the regulations and requested DeJong to make the appropriate payments for such livestock (CX 13, 14).

11. On December 29, 1972, in a State of Washington administrative proceeding, DeJong was ordered to "remit to the three livestock auctions (Marysville, Snohomish, Lynden) the purchase price of the animals cited in the notice of hearing" (RX 2). United States Department of Agriculture, Packers and Stockyards Administration, personnel had testified at said hearing (Tr. 655-56). That decision also indicated that should DeJong fail to pay as specified in the decision, its State license would be suspended until it complied (RX 2). The State administrative proceeding was appealed by DeJong and on appeal, the Whatcom

County Superior Court of the State of Washington granted summary judgment (hereinafter State Court ruling) for DeJong reversing the decision of the Director of Agriculture (RX 3). The State Court ruling found that the auction markets were placed on notice as to the conditions under which DeJong would purchase and that the markets chose to accept DeJong's bids on those conditions. That decisions was not appealed by the State Department of Agriculture.

12. (a) On April 3, 1974, shortly after the State Court ruling became final, DeJong sent written notices to all of the Northwest Washington livestock auction markets that, beginning May 1, 1974, DeJong's purchases of cattle at livestock sales would be subject to the conditions specified in CX 2, the February 1972 subject basis letter (CX 15).

Respondents Hygrade, Ferry and Mt. Vernon sent similarly drafted letters

during April 1974 to the Northwest Washington livestock auction markets. Ferry notified them that beginning April 29, 1974, its purchases of animals at [redacted] markets would be subject to the conditions that payment for such livestock would be delayed for three bank days after the date of bid pending a determination as to whether such livestock were fit for human consumption, and that there would be no payment for any of such livestock found after slaughter within the three days to be unfit for human consumption (CX 17). Mt. Vernon's letters were to the same effect as Ferry's, but the operative date of these conditions was stated as May 1, 1974 (CX 18). Hygrade notified the markets that beginning May 1, 1974, it would withhold the average per head cost of two slaughter animals for three bank days pending a determination of fitness for human consumption and there would be no payment for

unfit cattle slaughtered within three days (CX 16).

(b) A meeting was held at the Tacoma Livestock Market, Spanaway, Washington, on April 15, 1974, to discuss and implement a response to these April 1974 notices. All of the Northwest Washington livestock auction market owners or their representatives, a number of area farmers, officials from the Packers and Stockyards Administration, the State of Washington Department of Agriculture, and national officials from the markets' marketing association attended. The consensus of the market operators and the farmers in attendance was that they would not accede to the demands of the packers. Accordingly, a form letter was drafted and signed by all of the market agency operators or their representatives (CX 22A). The form letter was used as a model by the markets to notify the packers that the purchasing

terms of April 1974 letters were rejected. After the meeting, all of the market operators sent responses to respondents Hygrade, Mt. Vernon, Ferry and DeJong advising them that their bids for livestock could not be accepted until they rescinded their announced subject basis purchasing policy (CX 19, 20, 21, 22, 22A, 23, 24, 25). Farmers Auction and Snohomish Auction Market notified John F. Lenz, by letter, that purchases of livestock would continue on an "as is" basis and that no bids would be accepted until the subject basis purchasing policy was rescinded (CX 22, 25; Tr. 145-49, 204-06, 246-47).

Additionally, after the effective date of the packers' letters, most of the market operators or their personnel announced, in explicit terms, prior to the sales that all cattle were being sold on an "as is" basis (Tr. 709, 338-39, 208-09, 296).

13. (a) During the period May 1, 1974, through May 15, 1974, the Northwest Washington livestock auction markets, at which respondents were regular purchasers, conducted their scheduled weekly sales but no cattle purchases were made by any of the respondents. Such purchase bids as were made by respondents were understood by the markets to be on a "subject basis" even though the cattle were offered "as is". The bids were rejected on that basis and at no time did any of the respondents protest the refusal of the bids or announce that they were acceding to the markets' "as is" policy. Such bids as were thereafter made by resondents were considerd to be in jest. Although none of the respondents specifically announced at the time of making a bid that it was being made on a "subject basis", everyone in attendance at the sales understood their bids to be so conditioned and it is found that there was a definite

and clear meeting of the minds on this point by each of the respondent packers and the markets conducting the auction sales.

(b) Respondent Schenk [i.e., Lenz] did not send a written notice in April of 1974 as did the other respondents. His conduct was basically one of complete inaction. As was the case with the other respondents, he or his agent attended but did not purchase any livestock offered at the markets during the period May 1, 1974, through May 15, 1974, and his order buyers, while in attendance at the sales, indicated to the market operators that Schenk would not buy livestock on an "as is" basis at these sales. He gave every appearance to the market operators of supporting the other respondent packers and that he was withholding bids until such time as the animals were offered on a "subject-basis". If he had indicated that he was desirous of

purchasing cattle on an "as is" basis, his bids would have been accepted, but he and his representatives did not bid. The explanation that he proffered at the hearing that he decided to purchase cattle elsewhere because they were then available at a lower price is not plausible in the circumstances. It is found that his decision, to not bid on cattle offered during this period "as is" by the markets which normally supplied his needs, was deliberately intended to show his support of the other respondent packers and to maintain the solidarity of their announced position (Tr. 154-55, 339-41, 370, 391-93, 407-08, 486-87, 521, 540-43, 595-96, 735-39).

(c) Over the last two weeks of May 1974, respondents DeJong, Hygrade, Ferry and Mt. Vernon issued notifications to the stockyards-market agencies rescinding their

"subject" basis purchase conditions. During the last two weeks of May 1974 or shortly thereafter, John F. Lenz advised the markets with which he dealt that he would, in the future, agree to discontinue any attempt to purchase livestock on a subject basis and would resume buying livestock on an "as is" basis (Tr. 154, 212, 344-45, 484-87).

Furthermore, the respondents resumed their regular purchases of livestock at all of the Northwest Washington livestock auction markets beginning on or about May 16, 1974 (CX 34; Tr. 157-58, 230-31, 399, 484-88).

14. The actions by respondents to effectuate the sales conditions they proposed to the Northwest Washington livestock auction markets were predicated on the increased use of antibiotics by dairy farmers treating their own herds whose cull cattle are

the principal type of livestock purchased by respondents at those markets. Respondents have asserted, and it is found, that this increased use of antibiotics has allowed farmers to send a greater number of sick animals to the markets which give the appearance of being in good health only to be, with increasing frequency, condemned upon post-mortem inspection by health authorities. Respondents took their actions to discourage such practices and shift the burden of loss of diseased cattle back to the consignors.

The apparent belief by respondents that their proposals would be of overall benefit to cattle consignors in general, as well as to themselves, was not shared by the market operators who have testified that in their opinion, in addition to the added delay in payment of purchase prices to consignors of slaughter cattle, farmers

buying replacement animals for their dairy herds would demand similar conditional sales and the ultimate result of the proposals would be added administrative problems and expense to the markets. In short, each group had valid business reasons for its position on the respective merits of "as is" and "subject" sales.

15. As to the immediately preceding finding, Finding 14, packers "normally buy in the same trade areas," and over a period of years, they know "what their average condemnation rate is going to be and this is part of their cost and actually figured in their purchase price of the livestock" (Tr. 39). The condemnation rates on slaughtered cattle in the State of Washington are not out of line with the rest of the United States (Tr. 58-59). DeJong's condemnation rate on cattle from July 1, 1973, through June 30, 1974, was 1.14% (Tr. 78-79, 104). In 1973, Hygrade's Tacoma,

Washington, condemnations were 24 head out of 17,000 or .14%; in 1974, 57 head out of 30,000, or .19%; and in 1975, 99 head out of 40,000, or .24% (Tr. 699-700, 718-719; all figures approximations).

There are "literally hundreds of things an inspector can condemn a cow for" (Tr. 80). There are "many types of condemnations that no one can ascertain what caused them," i.e., whether the farmer or the packer was responsible for the condemnation (Tr. 102).

16. As to Findings 6 and 7, supra, animals are sold at auction markets in Northwest Washington (and in the entire United States on a "subject" basis only on very rare occasions. Except for the activities of resopndents involved in the proceeding, prospective purchasers at an auction market request that an animal be sold "subject" only if they notice some

defect which raises a question as to the fitness of the animal which has not been noticed by the auction market employees. If the defect is noticed by the auction market employees, they ordinarily announce that the animal will be sold "subject" (Tr. 28-35, 74-75, 120-122, 244, 250, 315, 366, 383, 387, 447, 462, 525, 553, 571, 701). Full payment is due for an animal purchased "subject" within one business day after it has been determined that such animal has passed Federal inspection (Tr. 35).

17. It would not be practicable or lawful for an auction market operator to sell a particular animal in the auction ring with some of the prospective buyers bidding on a "subject" basis and other prospective buyers bidding on the same animal on an "as is" basis. During the sale of an animal at auction, the auctioneer's chant indicates a certain price,

e.g., "26" (i.e. $26 per cwt.). A prospective buyer indicates his bid at that price vocally or by a movement of his finger, a wave of his hand, a nod of his head, etc. (Tr. 30-31, 296). Since the price that a prospective buyer is willing to bid varies depending on whether an animal is being sold "subject" or "as is," a bid recognized by the auctioneer, e.g., "26," could not mean "subject" to some prospective buyers and "as is" to others, any more than it could mean dollars to some prospective buyers and pesos to others. An agreement by an auction market operator that a bid by one prospective buyer (or a few buyers) is "subject" while the bids on the same animal by others are "as is" would be unjustly discriminatory and, therefore, unlawful under the Act (Tr. 31-32, 39, 53-54, 60-61).

18. The letter signed in February 1972

by the respondents, except Hygrade, referred to in Findings 9 and 12, supra, reads as follows (CX 2):

FEBRUARY 1972 LETTER (CX 2)

TO WHOM IT MAY CONCERN:

The undersigned packers have been realizing unusually heavy losses from cattle purchased by them at auction for slaughter which are condemned as unfit for human consumption due to the presence of infection, disease or medicines and drugs in their systems. These losses must stop! Accordingly, the undersigned packers hereby notify you that all bids which they make in the future will be made upon the condition that the animal will be found to be fit for human consumption by appropriate Government inspectors. In order to enforce this policy, we will pay for auctioned animals as follows beginning March 1, 1972:

1. Animals slaughtered within three (3) bank business days after the date of the bid will not be paid for if they are found to be unfit for human consumption by appropriate Government inspectors. Immediately upon condemnation, the packer will notify the market agency of the condemnation by tele phone, and a copy of the condemnation slip will be mailed to the market agency from which the animal was obtained.
2. If any animal is not slaughtered within three (3) bank business days after the date of the bid, or if it is

slaughtered within that time and found to be fit for human consumption, payment will be made by check mailed at the close of the third bank business day following the date of the bid. This letter was signed by the undersigned individuals on the dates indicated opposite their names.

_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 8, 1972
_____	DATE:	Feb. 11, 1972
_____	DATE:	Feb. 14, 1972
_____	DATE:	Feb. 15, 1972

19. The State of Washington administrative proceeding and the Whatcom County Superior Court proceeding referred to in Finding 11, supra, related to the first six transactions itemized in Finding 10(a), supra, involving respondent DeJong's failure to pay for purchases of cattle. The state proceedings did not involve the other five transactions itemized in Finding 10(a). The State Court judgment was served

on counsel for the State Department of Agriculture on February 14, 1974, and filed on February 15, 1974 (RX 3). The State had 30 days within which to file an appeal (Tr. 648). Accordingly, the time for appeal expired on or about Monday, March 18, 1974.

20. The letters from Hygrade, DeJong and Mt. Vernon to the auction markets announcing a change to "subject" purchasing, referred to in Finding 12(a), supra, all had an effective date of May 1, 1974 (CXs 15, 16, 18). Hygrade's letter was dated April 2, 1974, DeJong's was dated April 3, 1974, and Mt. Vernon's was undated. Ferry's letter is virtually identical to Mt. Vernon's except that Ferry's is dated April 29, 1974, and effective April 29, 1974 (CX 17). The complete text of the letters follows:

DEJONG'S 1974 LETTER

April 3, 1974

TO WHOM IT MAY CONCERN:
On and after May 1, 1974, all slaughter cattle purchased by our company at any livestock sale will be purchased under the conditions we sent you in a letter in February 1972.

MT. VERNON'S 1974 LETTER

TO WHOM IT MAY CONCERN:
Beginning May 1, 1974, all cattle purchased by us for slaughter at your auction will be purchased upon the condition that they will be found to be fit for human consumption by the federal meat inspector. We will pay for these cattle as follows:

1. Animals slaughtered within three (3) bank business days after the date of the bid will not be paid for if they are found to be unfit for human consumption by appropriate government inspectors. Immediately upon condemnation, the packer will notify the market agency of the condemnation by telephone and a copy of the condemnation slip will be mailed to the market agency from which the animal was obtained.
2. If any animal is not slaughtered within three (3) judicial days after the date of the bid, or if it is slaughtered within the time and found to be fit for human consumption, payment will be made by check mailed at the close of the third judicial day following the date of the bid.

FERRY'S 1974 LETTER

April 29, 1974

TO WHOM IT MAY CONCERN:

This is to notify you that beginning April 29, 1974, all bids made by the undersigned will be made upon the condition that the animal purchased will be found to be fit for human consumption by the appropriate government inspectors.

In the future we will pay for animals purchased at auction as follows:

1. Animals slaughtered within three (3) bank business days after the date of the bid will not be paid for if they are found to be unfit for human consumption by appropriate government inspectors. Immediately upon condemnation, the packer will notify the market agency of the condemnation by telephone, and a copy of the condemnation slip will be mailed to the market agency from which the animal was obtained.

2. If any animal is not slaughtered within three (3) judicial days after the date of the bid, or if it is slaughtered within that time and found to be fit for human consumption, payment will be made by check mailed at the close of the third judicial day following the date of the bid.

The two numbered paragraphs of Mt. Vernon's letter are identical to the two numbered paragraphs of Ferry's letter; and such paragraphs are identical to the two numbered paragraphs of the packers'

February 1972 letter (CX 2), except that in 1974, both Mt. Vernon and Ferry changed the phrase "bank business day(s)," where it appeared twice in paragraph numbered two of the letters, to "judicial day(s); "but in paragraph numbered one, neither Mt. Vernon nor Ferry changed the phrase "bank business days" to "judicial days."

HYGRADE'S 1974 LETTER

April 2, 1974

Commencing May 1, 1974, Hygrade Food Products will revise its policy of purchasing livestock sale yard cattle. The following policy will be instigated:

(1) Payment will be withheld on the average per head cost of two slaughter animals. The remainder of the proceeds will be sent as usual. When all cattle pass federal inspection, the total proceeds will be transmitted to the sale yards.

(2) Cattle slaughtered within three bank days and found unfit for human consumption will not be paid for. The company will notify livestock auction yard by telephone in the event an animal is condemned. A government condemnation slip will be sent to the sale yard as proof of condemnation.

(3) Any cattle not slaughtered within three bank days will not be subject to these terms. Any cattle that are found unfit for human consumption in this

> period of time will be the packer's responsibility. If you have any questions regarding this matter, please feel free call us.

Sam Wilson, Manager of the Fresh Meat Division of Hygrade's Tacoma, Washington, plant, who signed the foregoing letter, admitted that under that letter "the policy would be that Hygrade Food Products would purchase all animals on a subject to basis" (Tr. 704).[3] Mr. Wilson testified that withholding the average cost of two animals would be adequate to protect Hygrade as to any animals purchased at a particular sale which did not pass Government inspection (Tr. 704-705; see, also Finding 15, supra, as to Hygrade's low condemnation rate).

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[3]Previously, Hygrade's attorney had repeatedly attempted (at times successfully) to lead auction market witnesses to say that Hygrade's policy, under the letter, would be to buy all animals "as is" except for two (Tr. 174, 237, 359-361, 454,568-569).

Mr. Wilson testified that the decision as to Hygrade's purchasing cattle on a subject basis effective May 1, 1974, was not his decision, but rather "was a company decision" reached after discussing the matter with "our officers and people" (Tr. 705) and "legal counsel" (Tr. 719); that the decision was made as a result of the State Court decision referred to in Findings 11, 12 and 19, supra (Tr. 703); tht he did not consult with other packers as to the matter; and that it was an independent decision of Hygrade (Tr. 705). Mr. Wilson further testified (Tr. 713).

> Q. Did Hygrade at any time join with the other packers in the northwest, any of those in these proceedings or others, in setting policies?
> A. Not to my knowledge.

Mr. Wilson admitted that prior to sending the letter April 2, 1974, he had heard "trade talk" as to other packers purchasing on a subject basis beginning May 1, 1974; but he testified that the decision

to send Hygrade's letter of April 2, 1974, was made independently from such trade talk. Specificaly [sic], Mr. Wilson testified (Tr. 726-727):

> JUDGE PALMER: When you drafted and sent out the letters of April 2, 1974, and we're talking about Exhibit 16, were you aware that other packing houses were also sending out letters at that time?
>
> THE WITNESS: No, I was not aware that they were.
>
> JUDGE PALMER: Were you aware that packing houses intended not to buy meat at the sale yards unless they were sold on a subject basis during the month of May, or starting May 1, 1974?
>
> THE WITNESS: I did not know that for a fact.
>
> JUDGE PALMER: Had you heard something about it?
>
> THE WITNESS: There was trade talk.
>
> JUDGE PALMER: All right, sir, that's sufficient. Anything further, Mr. Henriot?
>
> REDIRECT EXAMINATION
>
> BY R. HENRIOT:
>
> Q. Was your decision to send out the letter of April 2, the revised policy, made independent of any trade talk?
>
> A. It was made independently from any trade talk. It had no effect.
>
> JUDGE PALMER: In other words, there was trade talk but you didn't actively sit down with any of the packers and discuss not buying cattle?

THE WITNESS: Absolutely not.
THE WITNESS: Absolutely not.
JUDGE PALMER: There were no meetings between you and the other respondents here?
THE WITNESS: No, sir.

Hygrade's Tacoma, Washington, plant has condemnations in other species of livestock (Tr. 720-721), but Hygrade's letter of April 2, 1974, related only to cattle. In addition, Hygrade is a national packer, slaughtering livestock throughout the United States (Tr. 720), but Hygrade did not attempt to institute a "subject" purchasing policy in any area of the country other than in Northwest Washington.

Of the four packers involved in the present appeal, each of which sent letters advising the auction markets that on or about May 1, 1974, they would only purchase cattle on a "subject" basis, two did not offer any testimony (Mt. Vernon and Ferry), and Hygrade offered testimony only from Sam

Wilson, who did not have authority to make the decision as to Hygrade's policy (Tr. 705).

21. With respect to the February letter signed by all of the respondents except Hygrade (CX 2; Finding 18, supra), Mr. Wilson testified that he "talked to our people in the company [i.e., Hygrade] and told them that I had seen this letter," but that "[t]here really wasn't any response. They just continued to keep our policy on an as is basis" (Tr. 720).

CONCLUSIONS OF LAW

I. The Respondents, Other Than Hygrade, Entered Into an Unlawful Conspiracy in February 1972, Which Did Not End Prior to Mid-May 1974.

This case is quite unusual! "Conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution." United States v. Morris 225 F.2d 91, 95 (C.A. 7), certiorari

denied, 350 U.S. 901. See also, Allen v. United States, 4 F.2d 688, 691 (C.A 7). But there, respondents, other than Hygrade, signed and circulated to auction stockyards in Northwest Washington an unlawful, conspiratorial agreement in February 1972 (C 2; Findings 9 and 18, supra). As stated by Judge Palmer with respect to the agreement (Initial Decision, pp. 24-25):

> The obvious tenor of the document is threatening and corecive. * * * The meaning of the document was not unclear to the recipient markets. They understood it to be what it was--an ultimatum by their major customers. Without the patronage of these customers, the markets could not profitably conduct their business. Upon receipt of this ultimatum, it is no wonder that the markets sought Government aid in order to resist.

Under the Packers and Stockyards Act regulatory program, livestock auction market operators, who are defined in the Act as "market agencies" (7 U.S.C. 201(c)), and who generally also meet the statutory

definition of "sotckyard owner" (7 U.S.C. 201 (a)), have the right and duty to determine whether livestock will be sold "subject" or "as is."[4] However, the respondents, other than Hygrade, acting collectively in February 1972, attempted to usurp that right and duty by forcing the auction market operators in Northwest Washington to sell all slaughter cattle to them on a "subject" basis.

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation of practice is prohibited and declared to be unlawful.

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[4] § 307 Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulations.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicition of livestock at such stockyards to conduct their operations in a manner which will foster, preserve, or insure an efficient, competititive public market. * * * (7 U.S.C. 208).

§ 203.8 Statement with respect to regulations and practices of stockyards owners and market agencies.

(a) * * * Stockyard owners and market agencies have the statutory right and duty to establish, observe, and enforce regulations and practices, which are not unreasonable or unjustly discriminatory, with respect to the furnishing of stockyard services.

* * *

(d) Livestock owners today have many alternative methods of buying and selling livestock which were not available at the time the Packers and Stockyards Act became law. Terminal livestock markets and auction markets compete with each other as well as other marketing channels, and stockyard owners and market agencies must continually seek ways to improve services and facilities offered to livestock owners. Subject to reasonable regulation, the right to control and conduct the business of a public stockyard remains in the stockyard company * * *. (9 CFR 203.8).

Prior to the agreement, respondents paid for cattle, which had no observable defects but which were later condemned, at the price determined by competitive bidding. Under the agreement, the price paid by respondents for such cattle would be reduced to zero. Hence with respect to

such animals, the agreement was a price fixing agreement, i.e., an agreement to pay nothing for such animals.

Respondents attempt to argue the reasonableness of their agreement, but it is well settled that the "rule of reason" does not apply to price fixing agreements. The are illegal per se because they inherently restrict competition and restrain commerce.[5] As stated in United States v. McKesson & Robbins, 351 U.S. 305, 309-310:

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable

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[5] Northern Pacific R. Co. v. United States, 356 U.S. 1, 5; United States v. McKesson & Robbins, 351 U.S. 305, 308-316; Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 386; Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213; United States v. Paramount Pictures, 334 U.S. 131, 143; United States v. Gypsum Co., 333 U.S. 364, 400; United States v. Line Material Co., 333 U.S. 287, 305-315; United States v. Masonite Corp., 316 U.S. 265, 274-282;

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate comerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices (footnotes omitted).

No one would even attempt, at this late date, to justify an agreement among competitors to pay $18 per cwt. for a certain type of slaughter cow. Why respondents think they can justify an agreement among themselves to pay zero dollars per cwt. for a certain type of slaughter cow (i.e., one later condemned) is beyond comprehension.

It is difficult to imagine a clearer case of an "unfair" practice--unfair to the

(Footnote Continued)

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-228; Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458; United States v. Trenton Potteres, 273 U.S. 392, 396-401.

market operators, who have the right and duty to determine what selling and payment practices will be in effect at their markets; and unfair to the consignors, who have the right to expect their agent, the market operator, to represent their best interests. Likewise, it is difficult to imagine a clearer case of a conspiracy to manipulate or control prices or otherwise restrain commerce. Hence the agreement violated §§ 202(a), (e) and (g) of the Act.[6]

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[6] § 202 Unlawful practices enumerated.

It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

* * *

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in

commerce or of restraining commerce; or

* * *

(g) Conspire combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a)--(d), or (e) of this section (7 U.S.C. 192).

Respondents' conduct was an attempt to exercise brute force to coerce the Northwest Washington auction markets into acceding to their demands. This is precisely what the Act was designed to prevent. It was the fear by Congress that packers would exercise their market power to control stockyards and livestock prices that led to the passage of the packers and

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards.[7]

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[7] Acccord: Denver Stock Yard Co. v. Livestock Ass'n 356 U.S. 282, 289-290; Crosse & Blackwell Company v. F.T.C., 262 F.2d 600, 604 (C.A. 4).

Stockyards Act. As stated in Stafford v. Wallace, 258 U.S. 495, 514, in explaining the circumstances leading to the enactment of the Packers and Stockyards Act:

In addition to agreeing to manipulate the price of cattle condemned after slaughter (by reducing the price from the amount established by competitive bidding to zero), respondents admit that the agreement would have affected the price of other cattle not condemned (by increasing the price of such cattle, respondents contend). But under the authorities cited in footnote 5, supra, a price fixing agreement is illegal per se irrespective of whether it results in raising or lowering prices.

Respondents contend, and Judge Palmer found, that respondents had sound business reasons for their actions. But the existence of "sound business reasons" is "not a defense to a proven conspiracy to fix prices" (Advertising Special Nat. Ass'n

v. Federal Trade Com'n, 238 F.2nd 108,118 (C.A. 1)) even if "from other points of view the [price fixing] arrangements might be deemed to have desirable consequences" (U.s. v. Masonite Corp., 316 U.S. 265, 276). Accord: U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-222.

In addition to violating the sections of the Act referred to above, respondents, by entering into the agreement, failed to conduct their buying operations "in competition with, and independently of, other packers," and, therefore, violated § 201.70 of the regulations (9 CFR 201.70).[8]

Judge Palmer concluded that respondents violated the foregoing sections

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[8] § 201.70 Restriction or limitation of competition between packers and dealers prohibited.

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operations in competition with, and independently of, other packers and dealers similarly engaged. (9 CFR 201.70).

of the Act and regulations, but his initial decision is silent as to complainant's request that he also find that respondents violated § 201.69 of the regulations, which provides (9 CFR 201.69):

> § 201.69 Furnishing information to competitior buyers.
>
> No packer, dealer, or market agency, in connection with transactions subject to the provisions of the act, shall, in person, or through employed buyers, for the purpose of restricting or limiting competition, manipulating livestock prices, or controlling the movement of livestock, prior to, or during the conduct of, his buying operations: (a) Furnish competitor packers, dealers, market agencies, or their buyers or representatives, similarly engaged in buying livestock, with information concerning his proposed buying livestock, with information concerning his proposed to be purchased, or prices to be paid; or (b) furnish any other buying information to competitor buyers.

Without discussing the matter, Judge Palmer failed to include in his cease and desist order the prohibition, requested by complainant, against "furnishing any information of such buying operations to

any other packer or livestock buyer." Respondents clearly violated § 201.69 of the regulations by furnishing each other with information as to their proposed buying operations, i.e., that beginning March 1, 1972, they would pay nothing for condemned cattle notwithstanding their competitive bids for such cattle made at public auction markets. Such information was for the purpose of restricting or limiting competition since, under the agreement, they would jointly refuse to pay the price determined by competitive bidding for cattle later condemned. The respondents undoubtedly knew that a group effort would be necessary to force the auction operators to acquiesce in such a drastic change. Such an agreement was for the purpose of manipulating prices since, under the agreement, none of the respondents would thereafter pay anything for condemned cattle, notwithstanding the price

determined by competitive bidding. Accordingly, respondents violated § 201.69 of the regulations, as well as the other sections of the Act and regulations previously discussed.

However, even if § 201.69 of the regulations had never promulgated, since respondnets furnished information of their buying operations to each other in pursuance of the unlawful conspiracy referred to above, it would be appropriate to include a prohibition of such activity in the cease and desist order. In the circumstances, I am broadening the cease and desist order to include the provisions requested by complainant in this respect.

The February 1972 agreement by respondents, other than Hygrade, was in and of itself an unlawful conspiracy. While under some Federal statutes a conspiracy must be evidenced by an overt act before a violation of law occurs, there is no such

requirement at common law or under the Sherman Anti-Trust Act. Leyvas v. United States, 371 F.2d 714, 717, n. 4 (C.A. 9); Fiswick v. United States, 329 U.S. 211, 216, n. 4; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-225, n. 59; United States v. Trenton Potteries, 273 U.S. 392, 402; Nash v. United States, 229 U.S. 373, 378.

The Standards applied in Sherman Act cases, if not more liberal standards, should be applied in this proceeding since the "statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act." Swift & Company v. United States, 393 F.2d 247, 253 (C.A. 7). Accord: Swift and Company v. United States, 308 F.2d 849, 853 (C.A. 7); Wilson & Company v. Benson, 286 F.2d 891,

895 (C.A. 7); United States v. Donohue Bros., 59 F.2d 1019, 1022 (C.A. 8).

Respondents argue that because it is lawful for a single packer to agree with an auction market operator that a particular animal shall not be paid for if condemned after slaughter, respondents' joint conduct must be lawful (see Hygrade's original brief, pp. 26-27; other respondents' original brief, pp. 21-22). But it is well settled that a combination of two or more persons, to force the accomplishment of what would be a lawful purpose if individually achieved, is an unlawful conspiracy. It "is familiar doctrine that lawful acts may become unlawful when taken in concert." United States v. Gypsum Co., 333 U.S. 364, 401.[9]

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[9] Accord: Duple Co. v. Deering, 254 U.S. 443, 465-469; Milk and Ice Cream Can Institute v. Federal Trade Com'n, 152 F.2d 478, 480-481 (C.A. 7); American Tobacco Co. v. United States, 147 F.2d 93, 106-107

Prior to 1974, none of the respondents other than De Jong took any action in furtherance of the conspiracy. But a conspiracy is not ended by a mere lapse of time. It is presumed to continue until the contrary is affirmatively established. Continental Baking Company v. United States, 281 F.2d 137, 155 (C.A. 6). A conspirator must take affirmative action and decisive steps to terminate his participation in the conspiracy. Hyde v. United States, 225 U.S. 347, 369-370; United States v. Cullen, 499 F.2d 545, 547 (C.A. 9 [sic] ; United States v. Chester, 407 F.2d 53, 55 (C.A. 3), certiorari denied, 394 U.S. 1020; United States v. Borelli, 336

(Footnote Continued)

(C.A. 6), affirmed, 328 U.S. 781; United States v. Perlstein, 126 F.2d 789, 794 (C.A. 3), certiorari denied, 316 U.S. 678. See also Callmann, Unfair Competition, Trademarks and Monopolies (3rd ed. 1967), § 15.3(c) (1), p. 347.

F.2d 376, 388 (C.A. 2); United States V. Anderson, 101 F.2d 325, 331 (C.A. 7); Eldredge v. United States, 62 F.2d 449, 451 (C.A. 10). And the burden is on the conspirator to substantiate any claim that he withdrew. United States v. Borelli, 336 F.2d 376, 388 (C.A. 2); United States v. Cohen, 145 F.2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799.

There is no evidence in this case that any of the conspirators withdrew from the conspiracy prior to mid-May 1974. Merely purchasing livestock in 1972 and 1973 without enforcing the terms of the February 1972 ultimatum is no evidence that the conspirators abandoned their conspiratorial purpose. In fact, I infer from their unity of action in 1974, following the State Court decision, that in 1972 and 1973, the respondent other than Hygrade were merely biding their time awaiting the outcome of

DeJong's activities in furtherance of the conspiracy.

Since respondents' conspiracy was so open and notorious, it can be inferred that they did not know that their joint venture was illegal. But even if respondents' conduct stemmed from an "innocent misapprehension" of the Packers and Stockyards Act, "it is legally irrelevant. The purity of * * * [respondents'] motives is immatreial if in fact they were engaged in an unlawful combination banned under the * * * Act." Advertising Special Nat. Ass'n v. Federal Com'n, 238 F.2d 108, 118, C.A. 1).[10]

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[10] See, also, the cases cited in In re David G. Henner, 30 Agr Dec 1151, 1260-1263 (1971); and In re Henry S. Shatkin, 34 Agr Dec 296, 298-314 (1975) holding that a mistake of law does not prevent a violation from being wilful [sic], in which case a respondent's registration can be suspended without prior warning (5 U.S.C. 558). A fortiori, an appropriate cease and desist order can be issued notwithstanding a mistake of law.

II. In Furtherance of the Conspiracy, Respondent DeJong Failed to Pay for Condemned Cattle in 1972 and 1973. All Co-conspirators Are Responsible Therefor.

The only respondent two [sic] followed through on the 1972 conspiratorial agreement, prior to the spring of 1974, was respondent DeJong. On 11 occasions in 1972 and 1873 [sic] respondent DeJong failed to pay for cattle found after slaughter to be unfit for human consumption (Finding 10(a), supra). The regulation require packers to pay for livestock by the close of the next business day, unless otherwise expressly agreed between the parties.[11]

11(b) Purchasers to pay promptly for livestock. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such

It has repeatedly been held by the Department that a packer's failure to pay when due for livestock is an "unfair" practice within the meaning of that term in the Packers and Stockyards Act (7 U.S.C. 192(a)).[12] See e.g., In re Cleve Farm Packing Co., 31 Agr Dec 747, 757-758 (1972); In re Loeb & Gottfried, 31 Agr Dec 530, 535, 537 (1972); In re Haas-Davis Packing Co. Inc., 29 Agr Dec 1249, 1251-1252 (1970); In re Sebastopol Meat Co., 28

(Footnote Continued)
agreement shall be disclosed in the purchaser's records and on the accountings or other documents issued by the purchaser relating to the transaction. (9 CFR 201.43(b).

[12] Offenses such as false weighing or defrauding a principal generally deprive the injured party of only a small part of the money due him, but a failure to pay for an animal deprives the injured party of 100% of the money due him. It would be a strange construction of the Act to hold that depriving an injured party of 100% of his money is not "unfair", but depriving him of a small fraction thereof (through false weighing or fraud) is "unfair".

Agr Dec 435, 441 (1969), affirmed sub nom. Sebastopol Meat Company v. Secretary of Agriculture, 440 F.2d 983 (C.A. 9). Similarly, several courts have indicated by their holdings or dicta that the method and manner of paymment for livestock falls within the proscriptions of the words "unfair, unjustly discriminatory, or deceptive practice or device" (7 U.S.C. 192(a), 213(a). Butz v. Glover Livestock Comm'n Co., 411 U.S. 181, 184; Sebastopol Meat Company v. Secretary of Agriculture, 440 F.2d 983 (C.A. 9); Bowman v. United States Department of Agriculture, 363 F.2d 81, 85 (C.A. 5); United States v. Donahue Bros., 59 F.2d 1019, 1023 (C.A. 8); United States v. Davenport Packing Company, Inc., No. RI-CR-72-1 (C.A. 7), decided November 28, 1973 (unpublished opinion attached as appendix to Complainant's Response to Respondents' Appeals); Guenther v. Morehead, 272 F. Supp. 721 (D.S.Iowa).

Respondents rely on the State Court decision referred to in Findings 11, 12 and 19, supra, reversing the State Director of Agriculture's holding that DeJong was required to pay for the condemned cattle. The State Court accepted the State Director of Agriculture's findings of fact (RX 3, p. 1), but held that DeJong was not required to pay for the six condemned animals involved in the case on the following grounds (RX 3):

> 2.2 Finding. That the complaining public livestock markets were placed on notice as to the conditions under which the petitioner would purchase slaughter cows at auction sales conducted at said public livestock markets.
>
> 2.3 Finding. That the said complaining public livestock markets chose to accept the petitioner's bids at their auction sales of slaughter cows, and as such the petitioner's conditions that the slaughter cows be fit for human consumption became a binding condition of the purchase agreement.
>
> 2.4 Finding. That the Director of Agriculture failed to consider the petitioner's conditions of purchase

established by the petitioner and accepted by complaining public livestock markets in accepting the petitioner's bid for slaughter cows.

2.5. Finding. That the Director of Agricuulture's failure to consider the the acceptance of such condition constitutes an error of law.

2.6. Finding. That, therefore, the petitioner is entitled to judgment as a matter of law.

The State Court's decision is not binding here because no Federal authority was a party to the proceeding and the decision was based on the State's regulatory program rather than the Federal regulatory program at issue here.[13]

Moreover, the State Court decision is not persuasive because it is palpably erroneous. The State Court accepted the

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[13] The power of Congress under the "commerce" clause extends to all transactions at posted stockyards. Stafford v. Wallace, 258 U.S. 495, 515-516; Farmers' Livestock Comm. Co. v. United States, 54 F.2d 375, 379 (3-Judge Court, E.D. Ill.).

State Director's finding of fact (see RX 3, p. 1), which state that one of the three auction markets involved sent a letter dated February 23, 1972, to the packers who signed the conspiratorial letter notifying them "that the market considered their purchase policy to be a violation of the Packers and Stockyards Act, and advising the signers that the market would not agree to the proposal" (RX 2, pp. 2-3). As to the other two markets involved in the State proceeding, the State Director found that they "indicate[d] their rejection of the [packers'] proposal" by "complaining to the Packers and Stockyards Administration and the State Department of Agriculture", and that the Packers and Stockyards Administration notified DeJong by letter of March 9, 1972, that "this federal agency considered the buying practice outlined in the packers' letter to be an unfair and discriminatory practice, and a conspiracy to effect

an unfair and discriminatory practice, both prohibited by the Packers and Stockyards Act" (RX 2, p. 3).

Notwithstanding the State Court's acceptance of those findings of fact showing that the markets rejected the packers' buying terms, the State Court held that the three markets accepted DeJong's conditions when he bid for livestock. In other words, the State Court looked on the matter as an ordinary contractual arrangement where both parties had equal power to establish the terms and conditions of sale.

But, as shown above in the first section of the conclusions, the auction markets involved are Federally regulated markets operating under a Federal statute which places the complet [sic] right and responsibility on the stockyard owner-market operators to set the terms and conditions of sale, subject only to Governmental

supervision. The buyers and consignors have no power whatever to establish any of the terms or conditions relating to anything that occurs at the market.

If the State Court's decision were sound, it would destroy the public livestock marketing system. Under the State Court's decision, each buyer could establish the terms and conditions relating to his purchase of animals at an auction stockyard merely by advising the market of such terms and conditions, notwithstanding the market's refusal to accept such terms. For example, each buyer could specify the exact holding pen that his livestock were to be held in after purchase; the number of days that the market had to hold his livestock after purchase; the exact feed formula to be supplied to his livestock; and (perhaps) the time when he would pay for the livestock (although complainant's regulations require payment by the next day

in the absence of an express agreement to the contrary, under the Court's holding, a market having knowledge of a buyer's express conditions agrees to such conditions as a matter of law when it accepts his bid).

An [sic] if the buyers have the power to specify the conditions of their purchases at the market notwithstanding the market's refusal to accept those conditions, it follows by a parity of reasoning that the sellers also have such power. Each seller could specify the exact conditions as to the holding and treatment of his livestock prior to sale, and the exact time when his livestock must be sold (e.g., at the beginning of the sale, during the middle of the sale, 10:00 a.m., etc.).

It is quite obvious that public livestock markets could not function if hundreds of persons had the power to determine the conditions in effect at each

market. Congress wisely placed the complete and absolute responsibility for making all such determinations on the stockyard owner-market operators, subject only to appropriate Governmental supervision.[14]

Accordingly, when a stockyard owner-market operator establishes that cattle are sold "as is" at his market, any packer who bids on cattle at that market is buying the cattle "as is"; and the packer's written or oral statement to the stockyard owner-market operator that his bids are on a "subject" basis is totally meaningless. The State Court's decision to the contrary is palpably erroneous.

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[14] "It is true, of course, that, subject to reasonable regulation in the public interest, the management and right to control the policy of a business affected with a public interest to its owners" (Acker v. United States, 12 F. Supp. 776, 779 (N.D. Ill.), affirmed, 298 U.S. 426).

Judge Palmer did "not reach the question of whether * * * [DeJong's] refusals [to pay for the condemned cattle] constituted a contractual breach with the markets involved" since, under the prompt payment regulation, a "packer can delay payment beyond the close of the next business day following the determination of the purchase price only when expressly agreed between the parties prior to the purchase (9 CFR 201.43(b)). The market operators have testified, and it is found, that they never agreed to any delay in payment by respondent. Under these circumstances, the Act was clearly violated by respondent DeJong" (Initial Decision, p. 25).

I disagree with that analysis. If the State Court's decision were correct, i.e., if the acceptance of DeJong's bids in the circumstances of this case created "subject" sales as a matter of law notwithstanding the market operators' desires to

sell the cattle "as is", then payment would never have been due for the condemned cattle, and the prompt payment regulation would not have been violated. However, for the reasons set forth above, the sales were "as is". Accordingly, the prompt payment regulation was violated, and DeJong's failure to pay for the condemned cattle in the 11 transactions itemized in Finding 10(a) was an "unfair"[15] practice in violation of § 202(a) of the Act (7 U.S.C. 192(a)).

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[15] Irrespective of whether Federal or State law governs where a packer and an auction market operator are involved in a private suit for damages, or whether a State regulatory program is being enforced, since this is a proceeding to enforce a Federal regulatory program, the meaning of the term "unfair", as used in the Federal statute, should be governed by Federal law rather than State law. See United States v. Matthews, 244 F.2d 626, 626-628 (C.A. 9). See, also, South Buffalo R. Co. v. Ahern, 344 U.S. 367, 371-372; Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 361-362; United States v. Standard Oil Co., 332 U.S. 301, 305; Board v. First

Although Judge Palmer held that DeJong violated the payment regulation, he refused to hold all of the conspirators responsible for DeJong's failure to pay, stating (Initial Decision, p. 26):

> Complainant has argued that the non-payments by DeJong were in furtherance of an ongoing conspiracy and serve as evidence each of the respondents, whether they joined the conspiracy in February of 1972 or in April-May 1974, proving the threats made in February 1972 were acted upon. Although the conspiracy cases cited by complainant tend to support this argument, they generally involved criminal convictions dependent upon circumstantial evidence of isolated actions to prove execution of a well-guarded plot, secretly hatched.

(Footnote Continued)

Publications, 322 U.S. 111, 120-124; Brady v. Southern Ry Co., 320 U.S. 476, 479; Illinois Steel Company v. B. & O. R. Co., 320 U.S. 508, 510-511; Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367; Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176; Prudence Corp. v. Geist, 316 U.S. 89, 95; D'oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 453-462; United States v. Hext, 444 F.2d 804, 807-809 (C.A. 4).

> But respondents were never particularly covert. Each directly fostered and furthered the combination by its own conduct subsequent to the issuance of the February 1972 letter; namely, the direct participation of each in the May 1974 boycott. It is therefore pointless to premise the culpability of the other respondents on DeJong's failures to pay, when their own conduct is sufficient.

Judge Palmer's reasoning misses the point. It is true that the other respondents' own conduct is sufficient to link them with the main thrust of the conspiracy, viz., to force auction market operators in Northwest Washington to sell slaughter cattle "subject." But it is not pointless to include in the cease and desist orders as to all respondents a prohibition as to "rough" tactics used by one co-conspirator in furtherance of the conspiracy. The failure to hold all conspirators responsible for such "rough" tactics would encourage conspirators to attempt unlawful endeavors, letting one conspirator utilize "rough" tactics, while

the other remained immune from the consequences of such "rough" tactics. Accordingly, it is settled doctrine, which should be applied here, that all conspirators are responsible for the acts of any conspirator done in furtherance of the conspiracy.[16]

This doctrine applied to Hygrade, also, since if one joins a conspiracy and "acts in concert with the original conspirators, he may be held responsible, not only for everything which may be done thereafter, but also for everything which has been done prior to his adherence to the criminal design.[17] The doctrine applies

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[16] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254. See, also, the cases cited in footnote 17, infra.

[17] Lile v. United States, 264 F.2d 278, 281 (C.A. 9). Accord: United States v. Gypsum Co., 333 U.S. 364, 393; United States v. Anderson, 101 F.2d 325, 332-333 (C.A. 7), certiorari denied, 307 U.S. 625.

even if the one joining the conspiracy does not know all of the members of the conspiracy or the part played by each of them. Lile v. United States, supra, 264 F.2d 278, 281 (C.A. 9).

Accordingly, all of the respondents should be ordered to cease and desist from failing to pay, when due, for livestock.

III. Hygrade Joined the Unlawful Conspiracy in 1974 and Engiged [sic], With the Other Respondents, in a Group Boycott of the Northwest Washington Auction Markets.

On April 2, 1974, Hygrade sent a letter to the Northwest Washington auction markets which announced, effective May 1, 1974, purchasing conditions identical in all vital respects to those announced by the other respondents in February 1972 (Findings 12(a), 18 and 20, supra). Specifically, the elements of Hygrade's 1974 letter (CX 16) which are identical to

those in the February 1972 conspiratorial letter (CX 2) are as follows

1. Both letters applied only to cattle (although Hygrade purchases other species).

2. Under both letters, all cattle would be purchased "subject" rather than "as is".

3. Both letters provided that the packer would refuse to pay for an animal found unfit for human consumption if slaughtered within the identical time period, viz., three bank days; and both provided for the packer to pay for condemned animals slaughtered after such period.

4. Both letters provided for notice of condemnation by telephone, with condemnation slips to be thereafter mailed to the auction markets.

The only difference between the purchasing conditions of the two letters

was in the method of payment. Hygrade would have withheld payment of only two animals from each sale until it was determined whether any animals failed to pass inspection. (Hygrade knew that no more than two animals from each sale would fail to pass inspection (see Findings 15 and 20, supra)); whereas the other respondents would have withheld payment for all cattle for three bank business days.

Sam Wilson, Hygrade's Tacoma, Washington, Fresh Meat Plant Manager, who signed the 1974 letter, when asked, "Did Hygrade at any time join with the other packers in the northwest, any of those in these proceedings or others, in setting policies," replied, "Not to my knowledge" (Tr. 713). However, considering the combined weight of eight circumstances, discussed immediately below, I infer that Hygrade knowingly and intentionally joined the conspiracy in 1974.

1. As shown above, the purchasing conditions in Hygrade's 1974 letter were identical in all vital respects to the February conspiratorial letter of the other respondents. (Similarly, the 1974 letters of the other respondents set forth purchasing conditions identical to their 1972 letter).

2. Hygrade knew that an attempt in February 1972 by all the other major buyers at the Northwest Washington auction markets failed to force the auction market operators to sell all slaughter cattle "subject." How could Hygrade, acting independently and alone, have hoped to force such a change by itself? In view of the unified stand of the auction market operators in 1972, supported by the Packers and Stockyards Administration of the United States Department of Agriculture, it is absurd to believe that Hygrade thought that it could, acting independently of the other packers,

coerce or convince the auction market operators to change their method of selling slaughter cattle to a "subject" basis.

3. Hygrade's letter was sent practically simultaneously with the letters of the other respondents in 1974, and all of the letters had the identical effective date, May 1, 1974, except for Ferry, which had an April 29, 1974, effective date. Respondents contend that they all simultaneously and independently arrived at the decision to send their 1974 letters as a result of the State Court decision referred to in Findings 11, 12 and 19, supra. But it is not likely that such uniformity in timing would have occurred absent collective action. The State Court decision was filed February 15, 1974. The time for appeal expired about March 18, 1974. Although the beginning of a month might have been picked by each respondent, acting independently, as the effective date for

action, not one of the respondents picked April 1, 1974, as the effective date, and not one picked June 1, 1974, or thereafter, as the effective date.

Moreover, the State Court decision was not of a nature that would have prompted each respondent, acting independently, to announce that he would begin purchasing all cattle "subject". In the first place, the Court decision was a State decision, under a State regulatory program. The Federal regulatory authority had advised the packers in March of 1972 that their 1972 group effort was illegal (CXs 4-9, Finding 9(c), supra). In addition, as stated in item 2 above, respondents knew that a group effort in 1972 by all of the major packers except Hygrade had been unsuccessful in forcing the auction markets to change to a "subject" sales policy. Hence the State Court decision was not likely to make each of the respondents, acting independently,

come to the conclusion that he alone could force the auction markets to change their sales policy effective May 1, 1974 (or April 29, 1974).

4. Sam Wilson, the only witness who testified for Hygrade, did not have authority to make the decision to send the letter and to refrain from buying cattle except on a "subject" basis beginning May 1, 1974. The officials who made that decision did not testify. Under the settled principle which has been followed in many proceedings before this Department [18] and in many judicial

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[18] See e.g., In re Central Arkansas Auction Sale, Inc., 36 Agr Dec (decided May 6, 1977), appeal pending; In re Livestock Marketers, 35 Agr Dec 1552, 1558 (1976); In re Whaley and Groover, 35 Agr Dec 1519, 1522 (1976); In re Ludwig Casca, 34 Agr Dec 1917, 1929-1930 (1975); In re Braxton M. Worsley, 33 Agr Dec 1547, 1571-1572); In re Trenton Livestock, Inc., 33 Agr Dec 499, 514 (1974), affirmed sub nom. Trenton

proceedings,[19] I infer that their testimony would have been adverse. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to

(Footnote Continued)

Livestock, Inc. v. Butz, 510 F.2d 966 (C.A. 4); In re J. A. Speight 33 Agr Dec 280, 300-301 (1974); and In re Sy B. Gaiber & Co., 31 Agr Dec 474, 499 (1972).

[19] See, Wigmore, Evidence (3rd ed. 1940), §§285-291; United States v. Di RE, 332 U.S. 581, 593; Interstate Circuit v. United States, 306 U.S. 208, 225-227; Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 111; Bilokumsky v. Tod, 263 U.S. 149, 153-155; Kirby v. Tallmadge, 160 U.S. 379, 383; International Union v. N.L.R.B., 455 F.2d 1357, 1362-1370 (C.A. D.C.); Milbank Mutual Insurance Company v. Wentz, 352 F.2d 592, 597 (C.A. 8); Hoffman v. C.I.R., 298 F.2d 784, 788 (C.A. 3); Neidhoefer v. Automobile Ins. Co. of Hartford, Conn., 182 F.2d 269, 270-271 (C.A. 7); Illinois Central Railroad Company v. Staples, 272 F.2d 829, 834-835 (C.A. 8); Bowles v. Lentin, 151 F.2d 615, 619 (C.A. 7), certiorari denied, 327 U.S. 805; Longini Shoe Mfg. Co. v. Ratcliff, 108 F.2nd [sic] 253, 256-257 (C.C. P.A.); National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 862, 867-868 (C.A. 2), certiorari denied, 304 U.S. 576.

have contradicted." Lord Mansfield, in Blatch v. Archer, Cowp. 66, quoted with approval in Wigmore, Evidence (3rd ed. 1940), §285.

Here, as in Interstate Circuit v. United States, 306 U.S. 208, 225-226:

> When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants.[20]

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[20] Similarly, the failure of respondents Mt. Vernon and Ferry to testify, together with the startling similarity in their letters (see finding 20, supra), gives rise to the inference that their testimony would have been adverse to respondents.

5. Hygrade's Tacoma, Washington, plant has condemnations in other species of livestock (Tr. 720-721), but Hygrade's letter of April 2, 1974, related only to cattle. In addition, Hygrade is a national packer, slaughtering livestock throughout the United States (Tr. 720), but Hygrade did not attempt to institute a "subject" purchasing policy in any area of the country other than in Northwest Washington.

6. Sam Wilson admitedly advised Hygrade's policy-making officials of the February 1972 letter signed by the other packers (Finding 21, supra). Moreover, he admitted that before Hygrade's 1974 letter was sent to the auction markets, he had heard "trade talk" as to the other packers purchasing only on a "subject" basis beginning May 1, 1974 (Finding 20).

7. Hygrade sent its letter, inter alia, to the Farmers Auction stockyard,

where the other respondents purchased cattle regularly, even though Hygrade had never purchased cattle at that market (CX 16, p. 6; CX 34; Tr. 178).

8. In addition to sending its letter of April 2, 1974, to the Northwest Washington auction markets, Hygrade, together with the other respondents, attended the Northwest Washington auction market sales as usual during the first two weeks of May 1974, but they purchased no cattle from the auction markets during those two weeks. Before the two weeks, and immediately thereafter, the respondents were the major purchasers of cattle at such markets (CX 34, see Findings 8 and 13, supra). Immediately prior to the "boycott" period, the markets had expressly rejected respondents' purchasing terms (Finding 12(b)); but unlike 1972, where only one packer attempted to implement its ultimatum, all of the respondents attempted to

implement the common policy during the first two weeks of May 1974.

Considering the foregoing eight circumstances collectively, I cannot give the slightest credence to Hygrade's claim that it acted independently of the other respondents. I infer that Hygrade knowingly and intentionally joined the conspiratorial efforts of the other respondents.

The circumstances must be judged not by dismembering the transactions and viewing the separate parts, but by considering the totality of the facual situation revealed in the case. See, e.g., United States v. Patten, 226 U.S. 525, 544; Carlson v. United States, 187 F.2d 366, 371-372 (C.A. 10), certiorari denied, 341 U.S. 940; Bond Crown & Cork Co. v. Federal Trade Comm., 176 F.2d 974, 979 (C.A. 4); American Tobacco Co. v. United States, 147 F.2d 93, 106-107 (C.A. 6), affirmed, 328 U.S. 781; United States v. Armour & Co.,

137 F.2d 269, 270 (C.A. 10). The existence of a common purpose or plan is frequently disclosed only by a "development and collocation of circumstances." American Tobacco Co. v. United States, 147 F.2d 93, 107 (C.A. 6), affirmed, 328 U.S. 781. See, also, United States v. Morris, 225 F.2d 91, 92-93 (C.A. 7), certoriari denied, 350 U.S. 901; Poliafico v. United States, 237 F.2d 97, 104 (C.A. 6), certiorari denied, 352 U.S. 1025.

Whether an unlawful combination "is proved is to be judged by what the parties actually did rather than by the words they used." United States v. Parke, Davis & Co., 362 U.S. 29, 44. Seldom is there any direct evidence of a conspiracy; it ordinarily is inferred from the things actually done.[21] "The existence of a conspiracy

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[21] See, e.g., Theatre Enterprises v. Paramount, 346 U.S. 537, 540-541; Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S.

may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose." Nye & Nissen v. United States, 168 F.2d 846, 852 (C.A. 9), affirmed, 336 U.S. 613.

Parallel business behavior "is admissible circumstantial evidence from

(Footnote Continued)

211, 213-214; Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 716, fn. 17; United States v. Paramount Pictures, 334 U.S. 131, 142; United States v. Gypsum Co., 333 U.S. 364, 393-399; American Tobacco Co. v. United States, 328 U.S. 781, 809; United States v. Bausch & Lomb Co., 321 U.S. 707, 723; United States v. Masonite Corp., 316 U.S. 265, 275; Glasser v. United States, 315 U.S. 60, 80; Interstate Circuit v. United States, 306 U.S. 208, 221, 226-227; Eastern States Lumber Ass'n. v. United States, 234 U.S. 600, 612; United States v. Iacullo, 226 F.2d 788, 794 (C.A. 7), certiorari denied, 350 U.S. 966; United States v. Morris, 225 F.2d 91, 92-93 (C.A. 7), certiorari denied, 350 U.S. 901; Milgram v. Loew's Inc., 192 F.2d 579, 583 (C.A. 3), certiorari denied, 243 U.S. 929; Bond & Cork Co. v. Federal Trade Comm'n, 176 F.2d 974, 979 (C.A. 4); Phelps Dodge Refining Corp. v. Federal Trade Comm'n, 139 F.2d 393, 396 (C.A. 2); United States v. Manton, 107 F.2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664.

Parallel business behavior "is admissible circumstantial evidence from which the fact finder may infer agreement." Theatre Enterprises v. Paramount, 346 U.S. 537, 540-541.[22] In that case, the court stated that it had "never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense" (id. at 541).

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[22] Accord: Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213-214; United States v. Paramount Pictures, 334 U.S. 131, 142; Trade Comm'n v. Cement Institute, 333 U.S. 683, 716, fn. 17; United States v. Masonite Corp., 316 U.S. 265, 275; Interstate Circuit v. United States, 306 U.S. 208, 226-227; Federal Trade Comm'n. v. Pac. Paper Ass'n., 273 U.S. 52, 62-63; Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 210; Eastern States Lumber Ass'n. v. United States, 234 U.S. 600, 612; Triangle Conduit & Cable Co. v. Federal Trade Com'n., 168 F.2d 175, 179 (C.A. 7), affirmed by an equally divided Court, 336 U.S. 956; Fort Howard Paper Co. v. Federal Trade Com'n. 156 F.2d 899, 906-907 (C.A. 7), certiorari denied, 329 U.S. 795; Milk and Ice Cream Can Institute v. Federal Trade Comm'n, 152 F.2d 478, 481 (C.A. 7).

But the Court held that the fact finder may infer agreement on the basis of such evidence (id. at 540).

The applicable principles as to the proof needed to establish a conspiracy were stated in Esco Corporation v. United States, 340 F.2d 1000, 1008 (C.A. 9), as follows:

> Written assurances * * * are unnecessary. So are oral asurances, if a course of conduct * * * once suggested or outlined by a competitor in the presence of other competitiors, is followed by all--generally and customarily--and continuously for all practical purposes, even though there be slight variations.
>
> It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. * * * Mututal consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. * * * An exchange of words is not required. * * * Thus not only action, but even a lack of action, may be

enough from which to infer a combination or conspiracy.[23]

"Once the existence of the common scheme is established, very little is required to show that defendant became a party--'slight evidence may be sufficient to connect a defendant to it.'" Safeway Stores, Inc. v. F.T.C., 366 F.2d 795, 801 (C.A. 9, quoting from Hernandez v. United States, 300 F.2d 114, 121-122 (C.A. 9); and Nye & Nissen v. United States, 168 F.2d 846, 852 (C.A. 9), affirmed, 336 U.S. 613. Here, the evidence indicating that Hygrade joined the conspiracy in 1974 is much more than slight--in fact, it is strong and compelling.

In Farmers Livestock Commission Co. v. United States, 54 F.2d 375, 380-381 (3-Judge Court, E.D. Ill.), the Court

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[23] Cf., Hanson v. Shell Oil Co., 541 F.2d 1352, 1359-1360 C.A. 9).

upheld the Secretary's findings and conclusions under the Packers and Stockyards Act involving a group boycott, stating:

> We shall not attempt to review the evidence in detail, but it clearly warrants a finding of unanimity of action, simultaneousness of time, identity of motive and completeness of result. The Secretary had before him substantial evidence to justify the finding that each boycotter refused to deal with Producers or N. O. B., hoping that the other operators would do the same, relying upon such action, and expecting that the others would in turn rely upon his following the same course of action. Apparently there was mutual reliance upon mutual refusal to deal.
>
> Evidence of an express agreeent was not necessary; a mere tacit understanding between the various parties so to act as to achieve a common unlawful purpose, followed by action in furtherance thereof, is sufficient to constitute an illegal combination. If there is an intent upon the part of two or more persons to commit an unlawful act and it is followed by concurrence between themselves and others in action, with intent to effect the common purpose, mutuality in action toward the end hoped to be achieved, there is substantial evidence cf wrongful joint undertaking, though there is no express agreement, and though no spoken or written work between the conspirators is shown. In other words, if the minds of the

> parties have met by agreement or by tacit understanding upon an illegal undertaking and, in pursuance of that understanding, concurrence of action to a common end follows, we have the essentials of a guilty combination. The parties may not have previously associated together; one may not know other members; but if, knowing that others have combined to violate the law, he becomes a co-operative party to an illegal undertaking, he becomes liable as a part thereof. As a corollary, it follows that evidence of illegal combination may be and usually can be sustained only by proof of circumstances. As the Supreme Court has said, it is elementary that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done.

The evidence in the present case clearly establishes a group boycott, which lasted for about two weeks, involving a conspiracy by all of the major purchasers of slaughter cattle at the Northwest Washington auction markets to refuse to buy cattle from the markets unless the markets acceded to the boycotters' demands to change their method of selling cattle. The selling method employed at the markets was

the customary method of selling livestock throughout the United States.

It is well settled that such a group boycott is illegal per se without regard to the reasonableness thereof. The courts now recognize that there are "classes of restraints which from their 'nature or character'" are "unduly restrictive, and hence forbidden by both the common law and the * * * [Sherman Act]. * * * Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances" (Klor's v. Broadway-Hale Stores, 359 U.S. 207, 211-212).[24]

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[24] Accord: United States v. General Motors, 384 U.S. 127, 145-147; Silver v. New York Stock Exchange, 373 U.S. 341, 347-349; Northern Pacific R. Co. v. United States, 356 U.S. 1, 5; Times-Picayune v. United States, 345 U.S. 594, 625; Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S.

As stated in Northern Pacific R. Co. v. United States, 356 U.S. 1, 5:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken. Among the practices

(Footnote Continued)

211, 213-214; Associated Press v. United States, 326 U.S. 1, 11-19; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 467-468; Binderup v. Pathe Exchange, 263 U.S. 291, 311-312; Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 609-612; Montague & Co. v. Lowry, 193 U.S. 38, 44-48. Cf., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-79 C.A. 9), certiorari denied, 396 U.S. 1062.

> which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 210; division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271, aff'd, 175 U.S. 211; group boycotts, Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457; and tying arrangements, International Salt Co. v. United States, 332 U.S. 392.

"In applying these rigid [per se] rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." United States v. Topco Associates, 405 U.S. 596, 610. See, also, Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165, 1167 (1964).

Manifestly, a group boycott such as was involved here is an "unfair" practice under the Packers and Stockyards Act (United States v. Am. Livestock Co., 279

U.S. 435, 437; Farmers' Livestock Commission Co. v. United States, 54 F.2d 375, 379 (3-Judge Court, E.D. Ill.)), and, also, violates 7 U.S.C. 202 (e) and (g) and 9 CFR 201.69 and 201.70.

IV. A Broad Cease and Desist Order Should Be Issued Against the Respondents.

Respondents argue that even if the alleged violations are proven, a cease and desist order should not be issued since the violations have ceased and there is no reasonable expectation that they will be repeated. I disagree. As stated by Judge Palmer (Initial Decision, pp. 30-31:[25]

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[25] In addition to the cases cited by Judge Palmer, see Labor Board v. Mexia Textile Mills, 339 U.S. 563, 567-568; Goodman v. Federal Trade Commission, 244 F.2d 584, 593-594 (C.A. 9)); National Labor Relations Board v. Bell Aircraft Corp., 206 F.2d 235, 238 (C.A. 2); Consumers Sales Corp. v. Federal Trade Commission, 198 F.2d 404, 407 (C.A. 2), certiorari denied, 344 U.S. 912; National Labor Relations Bd. v. United Mine Workers, 195 F.2d 961, 963 (C.A. 6), certiorari denied, 344 U.S. 920; National Labor Relations Board v. Globe

Cease and desist orders should therefore issue against each of the respondents. The Act specifically provides:

> If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. (7 U.S.C. 193 (b).

The cases cited by respondents, in which courts withheld injunctive relief in

(Footnote Continued)

Wireless, 193 F.2d 748, 752 (C.A. 9); National Labor Rel. Bd. v. Newspaper & Mail Del. Union, 192 F.2d 654, 656-657 (C.A. 2); National Labor Relations Bd. v. Denver Bldg. & Const. T. C., 192 F.2d 577, 579 (C.A. 10); Lane v. National Labor Relations Board, 186 F.2d 671, 674 (C.A. 10), certiorari denied, 342 U.S. 813; National Labor Relations Bd. v. United Brotherhood, 184 F.2d 60, 63 (C.A. 10), certiorari denied, 341 U.S. 947; Deer v. Federal Trade Commisson, 152 F.2d 65, 66 (C.A. 2); Chocolate Corp. v. Federal Trade Commission, 121 F.2d 968, 971 (C.A. 3); Perma-Maid Co. v. Federal Trade Commission, 121 F.2d 282, 284-285 (C.A. 6); Standard Container Mfrs' Ass'n v. Federal Trade Commission, 119 F.2d 262, 265 (C.A. 5).

light of the discontinuance of an alleged violation, involved the discretionary nature of a court's issuance of an injunction under its general equity powers. See L. B. Silver Co. v. Federal Trade Commission, 292 F.752 (6th Cir. 1923). So too, the holdings which struck down cease and desist orders by the Federal Trade Commission banning conduct long-discontinued, were based upon the necessity under the FTC Act of orders being premised upon a finding that the proceding was in the "public interest." 15 U.S.C. 45(b); Marlene's Inc. v. Federal Trade Commission, 216 F.2d 556, 559 (7th Cir. 1954); and Montgomery Ward Co. v. Federal Trade Commission, 379 F.2d 666, 672 (7th Cir. 1967).

But under the Act which here controls, we have neither such discretion nor is the exercise of our remedial powers so conditioned.

And even if the requirements under the Act were the same as those that obtained in the cited cases, the issuance of cease and desist orders would be required in light of the seriousness of the violations, the recency of their occurrence and the "cognizable danger" of their recurrence absent the orders. See United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). As to the latter, respondents did not end their efforts to coerce the markets into acceptance of their demands because of contrition or because their business needs and interests had changed. They ended because the markets endured the boycott and suffered the economic consequences. The GWashington [sic] livestock auction markets therefore require the protection of an order preventing respondents from again seizing upon an opportune time when business is slow, cattle are plentiful, prices low, a good supply is already on hand, and purchases

may easily be made elsewhere (Tr. 335-36, 668-69, 735-36 and 738), and utilize their combined purchasing power to enforce their demands.

For these various reasons this is a proceeding where heed should be paid the general rule stated in United States v. DuPont & Co., 336 U.S. 316, 334 (1961):

> For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.

Although I agree with the preceding quotation from Judge Palmer's decision, I believe that his cease and desist orders were not sufficiently broad. As shown above in Section I of the Conclusions, all of the respondents should be ordered to cease and desist from furnishing any information of buying operations to any other packer or livestock buyer. And as shown above in section II of the

Conclusions, all of the respondents should be ordered to cease and desist from failing to pay, when due, for livestock.

I have carefully considered whether the cease and desist order in this respect should be limited to requiring respondents to cease and desist from failing to pay, when due, for livestock which subsequently fails to pass Government meat inspection; and from failing to pay, whendue, for livestock where the failure relates, directly or indirectly, to an attempt to coerce someone into accepting any term, condition or policy relating to the sale of livestock. Considering all of the circumstances of this case and all of the ramifications of such a limited order, I have concluded against such an order.

In the first place, the conspiracy involved in this case was a blatant exercise of group power in an effort to bludgeon the Northwest Washington auction

markets into submitting to the packers' demands. Moreover, despite an express warning letter sent in March 1972 by the Packers and Stockyards Administration to each of the respondents except Hygrade advising the packers that their arrangement violated "the Packers and Stockyards Act and possibly the antitrust laws," the respondents, joined by Hygrade, engaged in a group boycott in 1974 in an effort to accomplish the original goal.

Although the respondents claim general support from the State Court decision referred to above, the State Court decision was subsequent to the payment violations and, therefore, could not have misled the respondents at the time the violations were occurring. In any event, as shown above, the State Court decision is erroneous, and a mistake as to the law does not prevent the imposition of an appropriate cease and desist order.

Moreover, if a broad cease and desist order is not issued where the violations are as flagrant and serious as in the present case, it would set a dangerous precedent that might lead others to violate the law, hoping, at worst, for an anemic cease and desist order which would not interfere appreciably with their future activities. In order to serve as an effective deterrent to similar violations by respondents and others in the future, a meaningful cease and desist order should be issued against the respondents relating to the payment violations.[26]

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[26] It is the Department's policy in all of the regulatory programs administered by the Department to impose severe sanctions for serious violations to serve as an effective deterrent not only to the individual respondents but also to other potential violators. See, e.g., In re Maine Potato Growers, 34 Agr Dec 773, 796 (1975), affirmed sub nom. Maine Potato Growers v. Butz, 540 F.2d 518 (C.A. 1); In re J. Acevedo & Sons, 34 Agr Dec 120, 145-160 (1975), affirmed sub nom. J. Acevedo & Sons v. United States, 524 F.2d 977 (C.A. 5); in re Southwest Produce, 34

In addition, I do not agree with Judge Palmer's limitation of the orders to respondents' activities within the State of Washington. Hygrade buys livestock nationwide, and respondent Lenz purchases some livestock outside of Washington (Tr. 714-717, 720, 735, 739-740). Even as to those respondents not purchasing livestock at present outside of Washington, they may do so in the future if it is to their advantage in view of restrictions of a cease and desist order applicable only to Washington purchases.

(Footnote Continued)

Agr Dec 160, 171 (1975), affirmed sub nom. Southwest Produce, Inc. v. Butz, 524 F.2d 977 (C.A. 5); In re Marvin Tragash Co., 33 Agr Dec 1884, 1913 (1974), affirmed sub nom. Marvin Tragash Co. v. United States Dept. of Agr., 524 F.2d 1255 (C.A. 5); In re James J. Miller, 33 Agr Dec 53, 64-80 (1974), affirmed sub nom. Miller V. Butz, 498 F.2d 1088, 1089 (C.A. 5); In re Trenton Livestock, Inc., 33 Agr Dec 499, 539-550 (1974), affirmed sub nom. Trenton Livestock, Inc. v. Butz, 510 F.2d 966 (C.A. 4).

To the best of my knowledge, in the entire 56 years' administration of the Packers and Stockyards Act, every cease and desist order issued has applied nationwide. Particularly in view of today's mobile society, I can think of no good reason for imposing a cease and desist order limited to a particular State or area.[27] If some of the respondents never engage in business in any State other than Washington in the future, the nationwide order will have no effect whatever outside of Washington. On the other hand, if they do engage in

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[27] The strongest case for a cease and desist order limited to a particular area would be where a branch of a national packer violated the Act without the knowledge of the packer's national officials. But to impose a localized order in such a case would remove much of the incentive for the packer's national officers to insist on compliance with the Act by all local managers. In any event, in the present case Hygrade's national officials were participants in Hygrade's violation.

business in the future outside of Washington, they should be restricted by the terms of the cease and desist order wherever they operate. There is nothing unique about Washington with respect to violations such as are involved here. Respondents might attempt to commit similar violations wherever they operate in the future to the same extent as in Washington. It is settled that an agency is not required to limit a cease and desist order to the precise geographical area in which an unlawful practice is found to exist.[28]

Finally, I disagree with Judge Palmer's limitation of the ordrs to activities at livestock auction markets. Auction markets are not the only or even

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[28] Swift & Company v. United States, 393 F.2d 247, 256 (C.A. 7); Saftwayy [sic] Stores, Inc. v. F.T.C., 366 F.2d 795, 806-807 (C.A. 9); Wilson & Company v. Benson, 286 F.2d 891, 896 (C.A. 7); Maryland Baking Co. v. Federal Trade Com'n, 243 F.2d 716, 718 (C.A. 4).

the principal source of livestock for meat packers (Tr. 33). If respondents are restricted from similar unlawful activity only at auction markets, they may try to accomplish their objective at feedlots or in direct purchases from farmers. For example, Paschal Drake, Director of the Packer and Poultry Division of the Packers and Stockyards Administration, tesitified that "meat packers in southern California issued a very similar ultimatum on their feed lots they were buying fed livestock from" (Tr. 48). Accordingly, a broader order should be issued applicable to respondents' livestock purchasing activities at all marketing outlets. It is settled that an agency "is not limited to prohibiting the 'illegal practice in the precise form' existing in the past," but may "fashion its relief to restrain 'other

like or related unlawful acts.'" F.T.C. v. Mandel Brothers, 359 U.S. 385, 392.[29]

The cease and desist order recommended by complainant is appropriate in view of the serious violations by respondents in this case.

V. The Department's Rules of Practice Should be Interpreted to Receive--Rather than to Exclude--as Much Evidence as Possible Relevant to the Issues.

This case serves as an appropriate vehicle for once again reminding the Deparment's Administrative Law Judges and counsel who participate in the Department's administrative proceedings that when

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[29] Accord: Federal Trade Comm. v. National Lead Co., 352 U.S. 419, 430-431; Maryland Baking Co. v. Federal Trade Com'n, 243 F.2d 716, 718 (C.A. 4); Consumers Sales Corp. v. Federal Trade Commission, 198 F.2d 404, 408 (C.A. 2), certiorari denied, 344 U.S. 912, See, also, Timkien Co. v. United States, 341 U.S. 593, 600.

admissibility questions arise, the Department's rules of practice should be interpreted from the standpoint of "Is there any way that this evidence can be admitted?" rather than from the standpoint of "Is there any way that this evidence can be excluded?" In a large number of cases before this Department, evidence has been excluded which would have been helpful to a resolution of the issues. But I have yet to see a case where evidence was admitted that should have been excluded.

One of the oft cited advantages of administrative hearings is that they are free from the restrictive, exclusionary rules of evidence applicable in court proceedings. It is well settled that the rules of evidence and procedure folowed [sic] in court proceedings are not applicable in administrative porceedings [sic]. The only evidence that should be excluded

is that which must be excluded under the Administrative Proceedure [sic] Act and the agency's rules of practice, viz., evidence which is irrelevant, immaterial, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely (see, e.g., 5 U.S.C. 556(d); 7 CFR 1.141 (g) (iv); 42 F.R. 746). As stated in In re Hines and Tindel, 35 Agr Dec 113, 125, fn. 11 (1976):

> Since objections were made in this case based on the "best evidence rule" and the "ooriginal [sic] record" rule (Tr. 13, 46), it is appropriate once again to restate the well established principle that none of the technical rules of evidence applicable in court proceedings, such as the best evidence rule or the original record rule are relevant in an administrative proceeding (see the cases cited in In re Trenton Livestock, Inc., 33 Agriculture Decisions 499, 513 (1974), affirmed sub nom. Trenton Livestock, Inc. v. Butz, 510 F.2d 966 (C.A. 4). "No effort whatever should be made in an administrative proceeding to follow the common law rules of evidence" (ibid.).

Similarly, in a remand order in In re Corona Livestock Auction, 36 Agr Dec--(1976), it is stated:

> It has repeatedly been held that the evidentiary rules applicable in court proceedings are not applicable in administrative proceedings before this Department. See, e.g., In re Hines and Tindel, 35 Agr Dec 113, 125, fn. 11 (1976). A question is not objectionable merely because the answer calls for a conclusion by the witness. Evidence of respondent's general method of selling cows was not inadmissable merely because the witness did not know the exact date of his observations. See Cella v. United States, 208 F.2d 783, 787-789 (C.A. 7), certiorari denied, 347 U.S. 1016.

In the present case, no attempt was made to have a prior affidavit by a witness received in evidence (see footnote 2, supra), but the prior affidavit would have been admissible and helpful since it was made when the events were still fresh in the mind of the witness. The rule against impeaching the testimony of one's own witness does not apply in administrative

proceedings before this Department. A person is free to call any witness and impeach his testimony if necessary for a full development of the record, without any showing of surprise.

In addition, there is no need to limit cross-examination to the direct examination, or to limit redirect to the cross-examination, etc.

In short, the Department's rules of practice should be interpreted in a liberal manner to receive all evidence possible which is relevant to the issues involved in a particular case, and the procedure followed should permit a full disclosure of all relevant evidence.

ORDER

Respondents DeJong Packing Company, Ferry Bros., Inc., Hygrade Food Products Corporation, Mount Vernon Meat Co., Inc.,

and John F. Lenz, their officers, directors, agents, employees, successors, and assigns, directly or indirectly, individually or in combination with others, or through any corporate or other device, in connection with their operations as packers, shall cease and desist from:

1. Entering into or acting in furtherance of any conspiracy, combination, agreement or arrangement with any other packer or livestock buyer for the purpose or with the effect of establishing or imposing any terms or conditions relating to the purchase of or the payment for livestock purchased in commerce.

2. Conducting any of its operations relating to the purchase of livestock in commerce jointly or in combination with any other packer or livestock buyer, or furnishing any information of such buying

operations to any other packer or livestock buyer.

3. Failing to pay, when due, the full purchase price of livestock purchased in commerce.

This order shall become effective as to each respondent on the first day after service upon such respondent.

APPENDIX D

[Received
Jan 25 1977]

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: DeJong Packing Co., et al., Respondents	)	P. & S. Docket No. 5087
	)	Decision and Orders

Preliminary Statement

This is a disciplinary proceeding instituted by the Packers and Stockyards Administration through its filing of a complaint, on January 27, 1975, charging eleven meat packers with violations of the Packers and Stockyards Act, 1921, as amended (hereinafter the Act), (7 U.S.C. 181 et seq.).

Only five of the original eleven respondents remain as active participants

in this proceeding; the charges against the others having been resolved by default, dismissal, or consent decree. The five remaining respondents are: DeJong Packing Company (hereinafter DeJong); Mount Vernon Meat Co., Inc. (hereinafter Mt. Vernon), Ferry Bros., Inc. (hereinafter Ferry), Hygrade Food Products Corporation (hereinafter Hygrade) and John F. Lenz d/b/a Schenk Packing Co. (hereinafter Lenz).

The complaint alleges that in order to obtain a change in the conditions applicable to cattle sold at certain stockyards in the State of Washington, respondents, during the period February 1972 through shortly after May 1974, participated in a conspiracy, combination, agreement or arrangement which was furthered during its course by acts, practices and devices proscribed by the Act and in conflict with regulations promulgated

pursuant to the Act (7 U.S.C. 192(a), (e) and (g), and 9 CFR 201.43(b), 201.69 and 201.70). Complainant seeks cease and desist orders under section 203 of the Act (7 U.S.C. 193).

A prehearing conference was held on October 2, 1975, in Seattle, Washington; a summary of which was filed on December 15, 1975. Oral hearing was held before me in Seattle, Washington, from March 16, 1976 through March 19, 1976. Rodney J. Streff, Esq. and James A. Brennan, Esq., Office of the General Counsel, United States Department of Agriculture, appeared as counsel for complainant. Peter Jay Visser, Esq. of Lecocq, Simonarson, Visser and Johnson of Lynden, Washington, appeared for respondents DeJong, Ferry and Mt. Vernon. James F. Henriot, Esq., of Eisenhower, Carlson, Newlands, Reha, Henriot and Quinn of Tacoma, Washington, appeared for respondent

Hygrade. Charles T. Cole, Esq., of Stanwood, Washington, appeared for respondent Lenz.

Complainant called 13 witnesses and introduced 33 exhibits into evidence (Nos. 1-30, 22A, 28A and 34). Respondents called 3 witnesses and introduced 3 exhibits into evidence. The transcript of the hearing comprises 742 pages. The hearing transcript will be referred to as "Tr." followed by the page number. Complainant's exhibits will be referred to as "CX" followed by the exhibit number. Respondents' exhibits will be referred to as "RX" followed by the exhibit number.

Subsequent to the hearing, the parties filed extensive proposed findings of fact, conclusions of law and supporting briefs. Briefing was completed upon the filing of a reply brief by complainant on November 5, 1976.

Findings of Fact

1. (a) Respondent DeJong is a corporation organized and existing under the laws of the State of Washington. Its principal place of business is located at its Lynden, Washington business address: P.O. Box 513, Lynden, Washington 98264.

(b) Respondent Ferry is a corporation organized and existing under the laws of the State of Washington. Its principal place of business is located at its Ferndale, Washington business address: P.O. Box 151, Ferndale, Washington 98248.

(c) Respondent Hygrade is a corporation organized and existing under the laws of the State of New York. Additional to its main headquarters in Detroit, Michigan, it has a principal place of business in Tacoma, Washington. The

respective addresses are: P.O. Box 4771, Detroit, Michigan 48219, and 1623 East J St., Tacoma, Washington 98401.

(d) Respondent Mt. Vernon is a corporation organized and existing under the laws of the State of Washington. Its principal place of business is located at its Mount Vernon, Washington business address: 1327-D McLean Rd., Mount Vernon, Washington 98273.

(e) Respondent John F. Lenz is an individual who did business as Schenk Packing Co., until October of 1974 and since that time has done business as Schenk Packing Co., Inc. His principal place of business is located at his Stanwood, Washington business address: P.O. Box 576, Stanwood, Washington 98292.

2. Respondents DeJong, Ferry, Mt. Vernon, Hygrade and Lenz, are now and at all times material herein, were meat

packers within the meaning and subject to the Act, buying livestock in commerce for purposes of slaughter and engaged in manufacturing or preparing livestock products for sale or shipment in commerce.

3. Burlington Sales Pavilion, Inc. stockyard, Burlington, Washington; Enumclaw Sales Pavilion stockyard, Enumclaw, Washington; Farmers Auction stockyard, Everson, Washington; Lynden Auction Market, Inc. stockyard, Lynden, Washington; Marysville Livestock Auction, Inc. stockyard, Marysville, Washington; Snohomish Auction Market stockyard, Snohomish, Washington; and Tacoma Livestock Market stockyard, Spanaway, Washington are now and at all times material herein were (1) stockyards posted under and subject to the provisions of the Act and (2) registered with the Secretary of Agriculture as market agencies selling livestock on a commission

basis. Each is a privately owned and operated business subject to governmental regulation located in Northwest Washington which functions as a selling agent for consignors of livestock for sale by public auction at the stockyard. Hereinafter they will initially be referred to as the "Northwest Washington livestock auction markets" and, alternatively, as "the markets," "the auction yards," "the auction markets" and "the stockyards-market agencies."

4. Under the customary trade practices and marketing procedures of the Northwest Washington livestock auction markets, which accord with prevalent practices and procedures at livestock auction markets throughout the United States, the purchase of livestock is on an "as is" basis, and full payment is due within one business day of purchase,

unless otherwise expressly specified by auction market personnel prior to the sale of an animal in accordance with a different and express agreement reached previous to the sale.

5. When animals are sold by an auction market on an "as is" basis, the purchaser buys the animals as he sees them with no guaranty that they are suitable for any purpose and he assumes the risk of subsequently discovered defects.

6. When animals are sold at an auction market on a "subject" basis, the sale is contingent upon the animal meeting specified criteria (e.g. fit for human consumption, fit for dairy production). Should the animal fail to meet the specified "subject" criteria, there is no sale and the purchaser is not required to pay the seller for the animal.

7. When cattle for slaughter are

sold "subject," the sale is contingent upon their passing federal inspection as being fit for human consumption and full payment is due within one business day after the animal has passed federal inspection. Such subject sales occur whenever the consignor has so directed or has not withheld permission from the market operator to offer the consigned animal in this manner and the market operator exercises such discretion in response to requests from prospective purchasers or in furtherance of the practice of auction markets in Northwest Washington to call attention to any defects in animals of which they are aware at the time of sale.

8. During the period February 1972 through May 1974, respondents were regular purchasers at the Northwest Washington livestock auction markets as follows (CX 34):

Stockyard-Market Agency	Regular Packer Purchasers
Farmers Auction Everson, Washington	DeJong, Ferry, Mt. Vernon, Schenk (Lenz) & Kratzig
Snohomish Auction Snohomish, Washington	DeJong, Hygrade, Mt. Vernon, Schenk (Lenz), McRae, Thorp
Tacoma Livestock Market Spanaway, Washington	Hygrade, Schenk
Enumclaw Sales Pavilion Enumclaw, Washington	Hygrade, Schenk (Lenz), Mt. Vernon
Burlington Sales Pavilion, Inc. Burlington, Washington	DeJong, Ferry, Mt. Vernon, Schenk (Lenz), McRae
Lynden Auction Market, Inc. Lynden, Washington	DeJong, Ferry, Mt. Vernon, Schenk (Lenz), McRae
Marysville Livestock Auction, Inc. Marysville, Washington	DeJong, Ferry, Mt. Vernon Hygrade, Schenk (Lenz) McRae, Kratzig, Thorp

Buyers for respondents purchased a large percentage of the slaughter cattle sold at these auction markets and their attendance at the sales was considered necessary by the markets for their operations to be profitable. In addition to slaughter cattle, the markets also sold calves, dairy cattle and other kinds of livestock.

9. (a) During the period February 8, 1972, each respondent, individually or through its authorized representatives, with the exception of respondent Hygrade, signed a written document (CX 2) which stated, in essence, that all bids for slaughter cattle by respondents would thereafter be subject to the condition that the animal be found after slaughter to be fit for human consumption by appropriate Government inspectors, and that, beginning March 1, 1972, payment for each animal would be delayed until the close of the

third bank business day following the date when it was bid upon, at which time payment would be made if the animal either had been found fit for human consumption after slaughter or had not yet been slaughtered, and no payment would be made for any of such livestock found to be unfit for human consumption. Shortly after the written document was signed, copies were sent to all of the stockyards-market agencies except Tacoma Livestock Market.

(b) On February 23, 1972, Marysville Livestock Auction, Inc. sent letters to each signatory of CX 2 in which it rejected the proposed purchasing policy and denounced it as an open violation of the Act (CX 3). The owner of Farmers Auction informed some of the packers shortly after receiving CX 2 that he would not, as a general rule, sell livestock to them on a subject basis. All of Farmers Auction's literature and forms, including buyers'

invoices, indicated that all sales were "as is". Farmers Auction also had a sign posted at the sales ring specifying that all guarantees of livestock were between buyer and seller and that all sales, unless otherwise specified, were "as is". Lynden Auction Market, Inc. did not accept the terms of CX 2, called Mr. Hoskin of the Packers and Stockyards Administration in Portland, Oregon, to report its receipt, continued to rely on a sign posted in the auction ring stating that all sales were on an "as is" basis, and was under the impression that its sales were on an "as is" basis. There is no evidence that Lynden Auction Market made any other effort to communicate its rejection of the proposal to the packers prior to conversations it had with DeJong sometime subsequent to July 25, 1972.

Burlington Sales Pavilion, Inc. refused to accept the terms of the 1972 subject

basis letter (CX 2) and had signs to the effect that all cattle were sold on an "as is" basis. An announcement was made prior to the sale of a particular animal if it was going to be sold "subject." There is no evidence that Burlington Sales Pavilion, Inc. made any other effort to communicate its rejection of the proposal to the packers. At Snohomish Auction Market, if an animal were to be sold subject, a specific announcement to that effect was made. There is no evidence that Snohomish Aunction Market made any other effort to communicate its rejection of the proposal to the packers.

(c) On March 8 and 9, 1972, the Packers and Stockyards Administration sent letters to the respondents who signed CX 2 advising them that it considered their arrangement to be a violation of the Act and that further administrative

action in this regard would be necessary if they did not "reconsider" such arrangement (CX 4-9). The letters from the Packers and Stockyards Administration did not request written responses from respondents (CX 4-9).

(d) From February 1972 through the end of March 1974, none of the respondents other than De Jong attempted to buy cattle on a "subject" basis except as they had done traditionally (particular animals with visible defects, or which had elicited no or very low bids when offered "as is," etc.), did not attempt to implement the policy outlined in CX 2 and paid for all cattle purchased at the respective Northwest Washington livestock auction markets.

(e) Respondent Lenz, during the period February 1972 through the end of March 1974, complied fully with the terms of "reconsideration" expressed in

the Hoskin's letter to him (CX 7); purchased all livestock on an "as is" basis (Tr. 251, 327, 370, 487, 516, 583-84, 586, 597-98, 733); made timely payment for all cattle purchased (Tr. 251, 327, 402, 516, 736) and communicated no request, requirement or suggestion to any auction yard, other than his signing of CX 2, that he be allowed to purchase on a subject basis (Tr. 345, 370, 388, 404-05, 515, 584, 610, 733). However, see finding 13(b), infra.

10. (a) Respondent DeJong failed to pay for the following purchases of cattle found after slaughter to be unfit for human consumption:

Date of Purchase	Purchased at	Weight of Cow (lbs.)	Purchase Price
5/30/72	Marysville Livestock Auction	1055	$189.90
7/11/72	Marysville Livestock Auction	1080	237.60

Date of Purchase	Purchased at	Weight of Cow (lbs.)	Purchase Price
7/13/72	Snohomish Auction Market	860	146.20
7/25/72	Lynden Auction Market	1230	280.44
8/1/72	Marysville Livestock Auction	880	178.64
8/8/72	Marysville Livestock Auction	1190	249.90
9/19/72	Lynden Auction Market	1255	252.25
10/3/72	Lynden Auction Market	1285	300.69
11/9/72	Snohomish Auction Market	1500	355.50
11/9/72	Farmers Auction	1290	251.55
3/13/73	Lynden Auction Market	925	185.00

In each of these transactions, the respective market paid the animal's consignor, even though the purchaser failed to pay the market for the livestock (Tr. 36, 131-32, 200-02, 464-67, 534-35).

(b) On June 16 and October 18, 1972, Marysville Livestock Auction, Inc.

sent statements to respondent DeJong seeking payment for the aforesaid cattle purchases on May 30, July 11, August 1 and August 8, 1972 (CX 10, 11). By letters dated July 7, July 20 and August 14, 1972, Marysville Livestock Auction, Inc. notified the Packers and Stockyards Administration of respondent DeJong's failure to pay for these cattle purchases (CX 12). Farmers Auction notified the Packers and Stockyards Administration of DeJong's failure to pay for livestock purchased at its stockyard (Tr. 132).

(c) By letters dated July 11, 1972, and January 30, 1973, the Packers and Stockyards Administration advised respondent DeJong that its failure to pay for livestock purchased at the stockyards owned by Marysville Livestock Auction, Inc., and Farmers Auction constituted violations of the Act and the regulations and requested DeJong to

make the appropriate payments for such livestock (CX 13, 14).

11. On December 29, 1974, in a State of Washington administrative proceeding, DeJong was ordered to "remit to the three livestock auctions (Marysville, Snohomish, Lynden) the purchase price of the animals cited in the notice of hearing" (RX 2). United States Department of Agriculture, Packers and Stockyards Administration personnel had testified at said hearing (Tr. 655-56). That decision also indicated that should DeJong fail to pay as specified in the decision, its state license would be suspended until it complied (RX 2). The State administrative proceeding was appealed by DeJong and on appeal, the Whatcom County Superior Court of the State of Washington granted summary judgment (hereinafter State Court ruling) for DeJong reversing the decision of the Director of Agriculture (RX 3). The State Court ruling

found that the auction markets were placed on notice as to the conditions under which DeJong would purchase and that the markets chose to accept DeJong's bids on those conditions. That decision was not appealed by the State Department of Agriculture.

12. (a) On April 3, 1974, shortly after the State Court ruling became final, DeJong sent written notices to all of the Northwest Washington livestock auction markets that, beginning May 1, 1974, DeJong's purchases of cattle at livestock sales would be subject to the conditions specified in CX 2, the February 1972 subject basis letter (CX 15). Respondents Hygrade, Ferry and Mt. Vernon sent similarly drafted letters during April 1974 to the Northwest Washington livestock auction markets. Ferry notified them that beginning April 29, 1974, its purchases of animals at the markets would be subject to the conditions that payment for such

livestock would be delayed for three bank days after the date of bid pending a determination as to whether such livestock were fit for human consumption, and that there would be no payment for any of such livestock found after slaughter within the three days to be unfit for human consumption (CX 17). Mt. Vernon's letters were to the same effect as Ferry's, but the operative date of these conditions was stated as May 1, 1974 (CX 18). Hygrade notified the markets that beginning May 1, 1974, it would withhold the average per head cost of two slaughter animals for three bank days pending a determination of fitness for human consumption and there would be no payment for unfit cattle slaughtered within three days (CX 16).

(b) A meeting was held at the Tacoma Livestock Market, Spanaway, Washington, on April 15, 1974, to discuss and

a response to these April 1974 notices. All of the Northwest Washington livestock auction market owners or their representatives, a number of area farmers, officials from the Packers and Stockyards Administration, the State of Washington Department of Agriculture, and national officials from the markets' marketing association attended. The consensus of the market operators and the farmers in attendance was that they would not accede to the demands of the packers. Accordingly, a form letter was drafted and signed by all of the market agency operators or their representatives (CX 22A). The form letter was used as a model by the markets to notify the packers that the purchasing terms of April 1974 letters were rejected. After the meeting, all of the market operators sent responses to respondents Hygrade, Mt. Vernon, Ferry and DeJong advising them that their bids

for livestock could not be accepted until they rescinded their announced subject basis purchasing policy (CX 19, 20, 21, 22, 22A, 23, 24, 25). Farmers Auction and Snohomish Auction Market notified John F. Lenz, by letter, that purchases of livestock would continue on an "as is" basis and that no bids would be accepted until the subject basis purchasing policy was rescinded (CX 22, 25; Tr. 145-49, 204-06, 246-47).

Additionally, after the effective date of the packers' letters, most of the market operators or their personnel announced, in explicit terms, prior to the sales that all cattle were being sold on an "as is" basis (Tr. 709, 338-39, 208-09, 296).

13. (a) During the period May 1, 1974 through May 15, 1974, the Northwest Washington livestock auction markets, at which respondents were regular purchasers,

conducted their scheduled weekly sales but no cattle purchases were made by any of the respondents. Such purchase bids as were made by respondents were understood by the markets to be on a "subject basis" even though the cattle were offered "as is". The bids were rejected on that basis and at no time did any of the respondents protest the refusal of the bids or announce that they were acceding to the markets' "as is" policy. Such bids as were thereafter made by respondents were considered to be in jest. Although none of the respondents specifically announced at the time of making a bid that it was being made on a "subject basis", everyone in attendance at the sales understood their bids to be so conditioned and it is found that there was a definite and clear meeting of the minds on this point by each of the respondent packers and the markets conducting the auction sales.

(b) Respondent Schenk did not send a written notice in April of 1974 as did the other respondents. His conduct was basically one of complete inaction. As was the case with the other respondents, he or his agent attended but did not purchase any livestock offered at the markets during the period May 1, 1974 through May 15, 1974, and his order buyers, while in attendance at the sales, indicated to the market operators that Schenk would not buy livestock on an "as is" basis at these sales. He gave every appearance to the market operators of supporting the other respondent packers and that he was withholding bids until such time as the animals were offered on a "subject-basis". If he had indicated that he was desirous of purchasing cattle on an "as is" basis his bids would have been accepted, but he and his representatives did not bid. The explanation that he proffered at the hearing that

he decided to purchase cattle elsewhere because they were then available at a lower price is not plausible in the circumstances. It is found that his decision to not bid on cattle offered during this period "as is" by the markets which normally supplied his needs, was deliberately intended to show his support of the other respondent packers and to maintain the solidarity of their announced position (Tr. 154-55, 339-41, 370, 391-93, 407-08, 486-87, 521, 540-43, 595-96, 735-39).

(c) Over the last two weeks of May 1974, respondents DeJong, Hygrade, Ferry and Mt. Vernon issued notifications to the stockyards-market agencies rescinding their "subject" basis purchase conditions. During the last two weeks of May 1974 or shortly thereafter, John F. Lenz advised the markets with which he dealt that he

would, in the future, agree to discontinue any attempt to purchase livestock on a subject basis and would resume buying livestock on an "as is" basis (Tr. 154, 212, 344-45, 484-87).

Furthermore, the respondents resumed their regular purchases of livestock at all of the Northwest Washington livestock auction markets beginning on or about May 16, 1974 (CX 34; Tr. 157-58, 230-31, 399, 484-88).

14. The actions by respondents to effectuate the sales conditions they proposed to the Northwest Washington livestock auction markets were predicated on the increased use of antibiotics by dairy farmers treating their own herds whose cull cattle are the principal type of livestock purchased by respondents at those markets. Respondents have asserted, and it is found that this increased use of antibiotics has allowed farmers to send a greater

number of sick animals to the markets which give the appearance of being in good health only to be, with increasing frequency, condemned upon post-mortem inspection by health authorities. Respondents took their actions to discourage such practices and shift the burden of loss of diseased cattle back to the consignors.

The apparent belief by respondents that their proposals would be of overall benefit to cattle consignors in general, as well as to themselves, was not shared by the market operators who have testified that in their opinion, in addition to the added delay in payment of purchase prices to consignors of slaughter cattle, farmers buying replacement animals for their dairy herds would demand similar conditional sales and the ultimate result of the proposals would be added administrative problems and expense to the markets. In

short, each group had valid business reasons for its position on the respective merits of "as is" and "subject" sales.

Rulings on Proposed Findings of Fact

Counsel for respondents have helpfully followed the practice of adopting as their own, each of complainant's proposed findings of fact with which they have no meaningful disagreement. Findings of fact 1 through 8, although edited and condensed, in essence embody such mutually proposed findings.

Finding 9 is based on complainant's proposed finding 11 and modifications proposed by the various respondents. Paragraph 9(b) incorporates the modifications proposed on behalf of respondents DeJong, Ferry and Mt. Vernon to the extent they accorded with the evidence of record. The last sentence of 9(c) incorporates the factual as opposed to the argumentative

portion of a modification proposed by respondent Lenz. Finding 9(d) is based on Hygrade's proposed finding 11(d). Hygrade's proposed finding 11(e) has been rejected as tending to distort the testimony of the witness; he was not rendering and would not be qualified to render an opinion as to whether the packers "abandoned their alleged conspiracy" (an ultimate legal issue before us for resolution); he merely admitted that he had no knowledge of any action, by any one other than DeJong, during the period February 1972 through March 1974 that would negative such an assertion. Finding 9(e) is in response and incorporates, to the extent supported by the record evidence, respondent Lenz's proposed findings 12 and 13.

Finding 10 is based on the modifications to complainant's proposed finding 12 offered by counsel for respondents DeJong,

Ferry and Mt. Vernon of which paragraph (a) in particular was found to be the better recitation of the relevant facts and devoid of the argumentative phrases which pepper the paragraph proposed by complainant.

Finding 11 is based on proposed finding 11 submitted in behalf of respondents DeJong, Ferry and Mt. Vernon which added a statement based on Tr. 655-56 to the other parties' mutually proposed finding 13.

Finding 12 is based on a finding mutually proposed by each of the parties with paragraph (a) having been most extensively edited for the sake of clarity.

Finding 13 pertains to the conduct of respondents and the Northwest Washington livestock auction markets subsequent to May 1, 1974, which was addressed in complainant's proposed finding 14, respondent Hygrade's modified proposed finding 14, and proposed findings 13 and 14 by respondents

DeJong, Ferry and Mt. Vernon. To the extent the finding differs with the proposals they were rejected as either argumentative or irrelevant.

Finding 14 addresses the subject matter of respondent Hygrade's two additional proposals.

Respondent Lenz's proposed findings 14, 15, 16 and 18 have been rejected as argumentative and not supported by the evidence of record. His proposed finding 17 is not an appropriate factual finding, and therefore, was not adopted even though there is no quarrel with the stated interpretation of the Act.

Proposed finding 15 offered in behalf of respondents DeJong, Ferry and Mt. Vernon is wholly argumentative and therefore refused.

Any other finding proposed by the parties not specifically mentioned has, to

the extent it is inconsistent with this decision, been rejected as not being truly reflective of the factual evidence of record.

Relevant Statutory Provisions and Regulations

THE PACKERS AND STOCKYARDS ACT

§ 201. "Packer" defined:

When used in this Act--

The term "packer" means any person engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live-stock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, live stock products, dairy products, poultry, poultry products, or eggs in commerce; . . . (7 U.S.C. 191; 42 Stat. 160)

§ 202. Unlawful practices enumerated

It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

* * *

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of

creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

* * *

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e). (7 U.S.C. 192; 42 Stat. 161; 49 Stat. 649; 72 Stat. 1749)

§ 301. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined

When used in this Act--

* * *

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce live stock on a commission basis or (2) furnishing stockyard services. (7 U.S.C. 201; 42 Stat. 163; 72 Stat. 1750).

§ 302. "Stockyard"; defined

(a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other enclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to

the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition. (7 U.S.C. 202; 42 Stat. 163; 72 Stat. 1750).

§ 312.

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of live stock. (7 U.S.C. 213; 42 Stat. 167; 72 Stat. 1750).

Regulations

§ 201.43(b). Payment and accounting for livestock and live poultry

* * *

(b) Purchasers to pay promptly for livestock. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly

agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis. (9 CFR 201.43; 19 F.R. 4528, July 22, 1954, as amended at 29 F.R. 1796, Feb. 6, 1964; 36 F.R. 2777, Feb. 10, 1971).

§201.58. Sales to be made openly and in a manner to promote interests of consignors and not conditioned on sales of other consignments.

Every market agency and licensee engaged in the business of selling livestock or live poultry on a commission or agency basis shall sell the livestock or live poultry consigned to it openly, at the highest available bid, and in such manner as to best promote the interests of the consignors. The market agency or licensee shall sell each consignment of livestock or live poultry on its merits, and shall not make the sale of one consignment of livestock or live poultry conditional on the sale of another and different consignment of livestock or live poultry: Provided, That this shall not prohibit the sale in graded lots of livestock or live poultry belonging to different consignors who have consented thereto. In such cases, settlement shall be on the basis of the weight shown on the scale

ticket issued at the time the consignor's livestock or live poultry is weighed. (32 F.R. 13255, Sept. 20, 1967).

§ 201.69 Furnishing information to competitor buyers

No packer, dealer, or market agency, in connection with transactions subject to the provisions of the act, shall, in person, or through employed buyers, for the purpose of restricting or limiting competition, manipulating livestock prices, or controlling the movement of livestock, prior to, or during the conduct of, his buying operations: (a) Furnish competitor packers, dealers, market agencies, or their buyers or representatives, similarly engaged in buying livestock, with information concerning his proposed buying operations, such as the species, classes, volume of livestock to be purchased, or prices to be paid; or (b) furnish any other buying information to competitor buyers. (9 CFR 201.69; 19 F.R. 4531, July 22, 1954, as amended, 24 F.R. 3183, April 24, 1959).

§ 201.70 Restriction or limitation of competition between packers and dealers prohibited

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operations in competition with, and independently of, other packers and dealers similarly engaged (9 CFR 201.70; 24 F.R. 3183, April 24, 1959).

Issues

The issues presented for determination are:

1. Did the actions of the respondents during the period February 1972 through May 1974 violate the Act in that they constituted:

(a) A conspiracy, combination, agreement, or arrangement to engage in a course of business or do any act for the purpose or with the effect of restraining commerce; or

(b) Unfair practices?

2. Were the acts of respondent Hygrade and the effects thereof, such that it may be held liable as a participant in any conspiracy? In making this determination, may the acts and declarations of the other respondents be used as evidence against it?

3. Was there compliance by respondent Lenz with instructions by complainant

sufficient to either estop this proceeding, or to constitute withdrawal from and termination of his participation in any conspiracy and preclude the acts and declarations of the other respondents being used as evidence against him?

4. Is the Secretary empowered to issue a cease and desist order against actions which either:

(a) Sought to accomplish lawful business goals; or

(b) Have now ceased?

Conclusions

First Issue:

It is concluded that the respondent packers DeJong, Ferry, Mt. Vernon, Hygrade and Lenz, by their actions during the period February 1972 through May 1974, violated the Act (7 U.S.C. 192(a), (3), and (g)), contravened a Departmental regulation (9 CFR 201.70), restrained commerce, and

committed an unfair practice in that they, in combination with each other, engaged in a group boycott and a concerted refusal to deal with the Northwest Washington livestock auction markets.

It is further concluded that respondent DeJong committed an additional unfair practice within the meaning and in violation of the Act and in direct contravention of a Departmental regulation (7 U.S.C. § 192(a) and 9 CFR § 201.43(b)) when it refused to promptly pay for cattle it had purchased on the occasions specified in finding 10(a) supra.

The Congressional motives which underlie the Act were throughly analyzed by the Supreme Court in Stafford v. Wallace, 258 U.S. 495, 514, 42 S. Ct. 397, 401, 66 L. Ed. 735 (1922) where in it was stated, inter alia:

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the

> shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards.

In 1979, the Supreme Court, in U.S. v. Am. Livestock Co., 279 U.S. 435, 437, considered the propriety of a cease and desist order issued by the Secretary of Agriculture under the Act requiring the discontinuance of a boycott. Justice Holmes, speaking for the court, stated:

> The appellees urge that there is nothing to prevent their dealing or refusing to deal with whom they choose. But we think that it does not need argument to show that a boycott of a dealer in a stockyard may be an unfair practice under the Act as it is found to have been in this case.

More recently, the Seventh Circuit, in Swift & Company v. United States, 393 F.2d 247, 253 and 254 (7th Cir. 1968); held agreements by meat packers and a dealer not to bid against the dealer to contravene 9 CFR 201.70 and to be unlawful under the Act:

Under the Sherman Act, it is true that a simple refusal to deal is permissible. United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992; United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505. However, the statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act. Swift & Company v. United States, 308 F.2d 849, 853 (7th Cir. 1962). Section 292(a) of the Act doese not require the Government to prove injury to competition. Wilson & Company v. Benson, 286 F.2d 891, 895 (7th Cir. 1961). The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen. Stafford v. Wallace, 258 U.S. 495, 521, 42 S. Ct. 397, 66 L. Ed. 735; Safeway Stores, Inc. v. Freeman, 125 U.S. App. D.C. 175, 369 F.2d 952, 956 (1966).

* * *

The lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed. Meat Packer Legislation hearings before the House Committee on Agriculture, 66th Cong., 2d Sess., pp. 22, 229, 250, 303, 1047, 2284 (1920).

But even under the Sherman Act; "Group boycotts, or concerted refusals by traders

to deal with other traders, have long been held to be in the forbidden category." Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959).

As such, they constitute per se violations not subject to proof under the "rule of reason." See United States v. Topco Associates, 405 U.S. 596, 606-612 (1972), United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-214 (1940), and Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165, 1167 (1964).

Under every standard, each of the respondents violated the Act when they boycotted the Northwest Washington livestock auction markets during May of 1974. Their actions were in furtherance of the arrangement entered into in February of 1972 as expressed in the document, CX 2, which all respondents other than Hygrade had signed.

In early 1972, Doyle DeJong's attorney drafted the document received in evidence

as CX 2, which DeJong then placed on a clipboard and while attending various auctions during the period February 8, 1972 to February 15, 1972, presented to other packers for their consideration and signing. Each of the respondents, except Hygrade, signed the document and copies of it were then sent to all of the markets. The document is herewith reproduced:

> TO WHOM IT MAY CONCERN:
> The undersigned packers have been realizing unusually heavy losses from cattle purchased by them at auction for slaughter which are condemned as unfit for human consumption due to the presence of infection, disease or medicines and drugs in their systems. These losses must stop! Accordingly, the undersigned packers hereby notify you that all bids which they make in the future will be made upon the condition that the animal will be found to be fit for human consumption by appropriate Government inspectors. In order to enforce this policy, we will pay for auctioned animals as follows beginning March 1, 1972:
> 1. Animals slaughtered within three (3) bank business days after the date of the bid will not be paid for if they are found to be unfit for human consumption by appropriate Government inspectors. Immediately upon condemnation, the packer will notify the

market agency of the condemnation by telephone, and a copy of the condemnation slip will be mailed to the market agency from which the animal was obtained.

2. If any animal is not slaughtered within three (3) bank business days after the date of the bid, or if it is slaughtered within that time and found to be fit for human consumption, payment will be made by check mailed at the close of the third bank business day following the date of the bid.

This letter was signed by the undersigned individuals on the dates indicated opposite their names.

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 8, 1972

s/_____ DATE: Feb. 11, 1972

s/_____ DATE: Feb. 11, 1972

s/_____ DATE: Feb. 15, 1972

The obvious tenor of the document is threatening and coercive. To state, as respondent Lenz did that he believed he had only signed a petition of some sort, is absurd. The meaning of the document was not unclear to the recipient markets. They understood it to be what it was - an ultimatum by their major customers. Without the patronage of these customers, the markets could not profitably conduct their business. Upon receipt of this ultimatum, it is no wonder that the markets sought Government aid in order to resist.

The only respondent, however, who took further action prior to April of 1974 to follow through on the conditions of purchase stated in the 1972 letter was respondent DeJong. He alone failed to pay for purchased cattle found after slaughter to be unfit for human consumption. We do not reach the question of whether his refusals constituted a contractual breach with the

markets involved since that is not at issue in this proceeding. Nor obviously, do we have before us the issue that was before the Whatcom County Court of whether his conduct called for suspension of his Washington State license. For that reason, in addition to the others advanced by complainant, the doctrine of collateral estoppel is inapplicable. What is at issue, and what is decided, is that each failure to pay constituted an unfair practice within the meaning of the Act which was thus violated by DeJong as to each transaction specified in finding 10(a). The governing regulation is explicit. A packer can delay payment beyond the close of the next business day following the determination of the purchase price only when expressly agreed between the parties prior to the purchase (9 CFR 201.43(b)). The market operators have testified, and it is found, that they never

agreed to any delay in payment by respondent. Under these circumstances, the Act was clearly violated by respondent DeJong. See Bowman v. United States Dept. of Agriculture, 363 F.2d 81, 85 (5th Cir. 1966).

Complainant has argued that the non-payments by DeJong were in furtherance of an ongoing conspiracy and serve as evidence against each of the respondents, whether they joined the conspiracy in February of 1972 or in April-May 1974, proving the threats made in February 1972 were acted upon. Although the conspiracy cases cited by complainant tend to support this argument, they generally involved criminal convictions dependent upon circumstantial evidence of isolated actions to prove execution of a well-guarded plot, secretly hatched. But respondents were never particulary covert. Each directly fostered and furthered the combination by its own

conduct subsequent to the issuance of the February 1972 letter; namely, the direct participation of each in the May 1974 boycott. It is therefore pointless to premise the culpability of the other respondents on DeJong's failures to pay, when their own conduct is sufficient.

Second Issue:

It is urged by respondent Hygrade that its conduct was reflective of a business decision made independently and unrelated to the conduct of the other respondents, precipitated instead by the State Court ruling which upheld respondent DeJong's previous conduct. It is clear however, that a market could not continue to offer slaughter cattle on an "as is" basis if the bids by one of the packers in attendance were in reality being made and accepted on a "subject" basis. This would amount to a discriminatory and deceptive practice by the market in violation of the

Act and contrary to Departmental regulations (7 U.S.C. 213 and 9 CFR 201.58). Respondents were therefore demanding that "subject" sales totally replace "as is" sales as to all slaughter cattle offered by the markets. Since this would be the only way in which the demand of any of the respondents could be accepted by a market, the demands by each respondent were interdependent and supportive of similar demands by the other packers. The fact that Hygrade phrased the terms of its proposal somewhat differently from the others is immaterial. The only choice any of the demands left the markets was to face the consequences of a concerted boycott by their major customers or agree to offer all slaughter cattle on a "subject" basis. Conceivably, the markets could bargain with the other respondents to ease their demands and utilize Hygrade's somewhat less oppressive formula; but regardless of its precise

terms, the same formula would apply to all of the respondents if the markets yielded to the boycott.

The fact that the boycott followed a pre-existing arrangement and combination to which Hygrade had not been a party does not exonerate it. "An express agreement is not necessary to prove conspiracy." U.S. v. Ward Baking Co., 224 F. Supp. 66, 68 (E.D. Pa. 1963). "But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done . . ." Eastern States Lumber Ass'n. v. U.S., 234 U.S. 600, 612 (1914). See also United States v. Paramount, 334 U.S. 131, 142 (1948); and Farmers' Livestock Commission Co. v. United

States, 54 F.2d 375, 380-381 (E.D. Ill. 1931). The May 1974 group boycott, itself, constituted sufficient proof of the conspiracy in which Hygrade participated since, as in Farmers' Livestock, supra, 381: "There was mutual reliance upon mutual refusal to deal."

However, the pre-existing agreement and acts of the other respondents are admissible evidence against Hygrade. ". . . . the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy." United States v. Gypsum Co., 333 U.S. 364, 393 (1948). "If one has knowledge of the conspiracy and with that knowledge intentionally does some act or thing in furtherance thereof he may be held liable . . . . If so, he adopts as his own the past and future acts of all his

conspirators." U.S. v. Ward Baking Co., 224 F.Supp. 66, 70 (E.D. Pa. 1963). Hygrade had such knowledge (Tr. 719-720).

Third Issue:

Respondent Lenz argues that whatever his participation in the conspiracy may have been when he signed the February 1972 letter, he fully complied with the letters from P&SA directing him to reconsider his action. He urges that under the circumstances, his inaction amounts to such a reconsideration and an abandonment of any conspiratorial scheme to which he may have been a party. But as was the case in United States v. Cullen, 499 F.2d 545, 547 (9th Cir. 1974).

> The evidence shows far less than necessary to establish appellant's claim of withdrawal from the conspiracy. He stops far short of a disavowal thereof or of any action which would have defeated the purpose of the conspiracy, and he took no definite, decisive and positive steps which showed that his disassociation was sufficient.

The cited case is but one of a long line of decisions following Hyde v. United States, 225 U.S. 347, 369-72 (1912) which held not only that the burden is on a conspirator to show that he took "affirmative action" to withdraw from the conspiracy, but also that his affirmative action was not subsequently negatived through further participation in the conspiracy by "an acquiesence which embraced . . . later acts."

It has been specifically found that respondent Lenz's conduct during May 1974 supported and furthered the concerted boycott and in the light of which his inaction during the March 1972-April 1974 interim was insufficient to prove withdrawal.

Respondent's "equitable estoppel" argument is also unavailing. He has not demonstrated that he was misled by a misrepresentation or suffered detriment in reliance upon it. See Buder v. Denver

National Bank, 151 F.2d 520, 524 (8th Cir. 1945); Grand Trunk Western R. Co., v. H. W. Nelson, Co., 116 F.2d 823, 836 (6th Cir. 1941), rehearing denied, 118 F.2d 252 (1941); Freedman v. The Concordia Star, 250 F.2d 867, 869 (2nd Cir. 1958).

Fourth Issue:

The respondents argue that their actions merely sought to accomplish lawful business goals and for that reason they should not be held to have violated the Act. But as was stated in Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959):

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . .

In U.S. v. General Motors, 384 U.S. 127, 146-47 (1966) the Supreme Court reviewed the development of this doctrine and stated:

> Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins . . . any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.

Cease and desist orders should therefore issue against each of the respondents. The Act specifically provides:

> If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. (7 U.S.C. 193(b)).

The cases cited by respondents, in which courts withheld injunctive relief in light of the discontinuance of an alleged violation, involved the discretionary nature of a court's issuance of an injunction under its general equity powers. See

L. B. Silver Co. v. Federal Trade Commission, 292 F. 752 (6th Cir. 1923). So too, the holdings which struck down cease and desist orders by the Federal Trade Commission banning conduct long-discontinued, were based upon the necessity under the FTC Act of orders being premised upon a finding that the proceeding was in the "public interest." 15 U.S.C. 45(b); Marlene's, Inc. v. Federal Trade Commission, 216 F.2d 556, 559 (7th Cir. 1954); and Montgomery Ward Co. v. Federal Trade Commission, 379 F.2d 666, 6572 (7th Cir. 1967).

But under the Act which here controls, we have neither such discretion nor is the exercise of our remedial powers so conditioned.

And even if the requirements under the Act were the same as those that obtained in the cited cases, the issuance of cease and desist orders would be required in light of the seriousness of the violations,

the recency of their occurrence and the "cognizable danger" of their recurrence absent the orders. See United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). As to the latter, respondents did not end their efforts to coerce the markets into acceptance of their demands because of contrition or because their business needs and interests had changed. They ended because the markets endured the boycott and suffered the economic consequences. The Washington livestock auction markets therefore require the protection of an order preventing respondents from again seizing upon an opportune time when business is slow, cattle are plentiful, prices low, a good supply is already on hand, and purchases may easily be made elsewhere (Tr. 335-36, 668-69, 735-36 and 738), and utilize their combined purchasing power to enforce their demands.

For these various reasons this is a proceeding where heed should be paid the general rule stated in United States v. DuPont & Co., 366 U.S. 316, 334 (1961):

> For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.

Accordingly, the attached Orders shall be entered.

s/_____
Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: DeJong Packing Co., et al., Respondents	)	P. & S. Docket No. 5087 Order With Respect to DeJong Packing Co.

It is herewith ordered that respondent DeJong Packing Co., its officers, directors, agents, employees, successors and assigns, directly or indirectly, individually or in combination with others, or through any corporate or other device, in connection with its operations as a packer, purchasing livestock in commerce at livestock auction markets within the State of Washington, shall cease and desist from:

1. Initiating or participating in any group boycott, concerted refusal to deal, or any other coercive action or device, in combination, agreement, or arrangement with one or more packers or livestock buyers to effectuate terms or conditions at any

livestock auction market relating to the purchase of livestock in commerce, or payment therefor.

2. Failing to conduct its buying operations in competition with, and independently of, other packers and dealers similarly engaged.

3. Failing to pay the full amount of the purchase price of livestock before the close of the next business day following the purchase and the determination of the amount of the purchase price as specified and subject to the exceptions contained in the pertinent regulations, namely, 9 CFR § 201.43(b).

This order shall become effective upon the passage of 35 days from service of a copy upon respondent, subject, however, to the provisions that apply in the event of

an appeal to the Secretary (9 CFR §§ 202.16 and 202.18).

Done at Washington, D.C.
January 25, 1977

s/_____

Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: DeJong Packing Co., et al., Respondents	)	P. & S. Docket No. 5087 Order With Respect to Hygrade Food Products Corporation

It is herewith ordered that respondent Hygrade Food Products Corporation, its officers, directors, agents, employees, successors and assigns, directly or indirectly, individually, or in combination with others, or through any corporate or other device, in connection with its operations as a packer, purchasing livestock in commerce at livestock auction markets within the State of Washington, shall cease and desist from:

1. Participating in any group boycott, concerted refusal to deal, or any other coercive action or device, in combination, agreement, or arrangement with one or more packers or livestock buyers to effectuate

terms or conditions at any livestock auction market within the State of Washington relating to the purchase of livestock in commerce, or payment therefor.

2. Failing to conduct its buying operations in competition with, and independently of, other packers and dealers similarly engaged.

This order shall become effective upon the passage of 35 days from service of a copy upon respondent subject, however, to the provisions that apply in the event of an appeal to the Secretary (9 CFR §§ 202.16 and 202.18).

Done at Washington, D.C.
January 25, 1977

s/_____
Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: DeJong Packing Co., et al., Respondents	)	P. & S. Docket No. 5087 Order With Respect to John F. Lenz, d/b/a Schenk Packing Co. and Schenk Packing Co. Inc.

It is herewith ordered that respondent John F. Lenz, who did business as Schenk Packing Co., and his successor in interest, Schenk Packing Co., Inc., their officers, directors, agents, employees, successors and assigns, directly or indirectly, individually or in combination with others, or through any device, in connection with his or its operations as a packer, purchasing livestock in commerce at livestock auction markets within the State of Washington, shall cease and desist from:

1. Participating in any group boycott, concerted refusal to deal, or any other coercive action or device, in combination, agreement, or arrangement with one or more

packers or livestock buyers to effectuate terms or conditions at any livestock auction market within the State of Washington relating to the purchase of livestock in commerce, or payment therefor.

2. Failing to conduct buying operations in competition with, and independently of, other packers and dealers similarly engaged.

This order shall become effective upon the passage of 35 days from service of a copy upon respondent subject, however, to the provisions that apply in the event of an appeal to the Secretary (9 CFR §§ 202.16 and 202.18).

Done at Washington, D.C.
January 25, 1977

s/_____
Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: DeJong Packing Co., et al., Respondents	)	P. & S. Docket No. 5087 Order With Respect to Mount Vernon Meat Co., Inc.

It is herewith ordered that respondent Mount Vernon Meat Co., Inc., its officers, directors, agents, employees, successors and assigns, directly or indirectly, individually or in combination with others, or through any corporate or other device, in connection with its operations as a packer, purchasing livestock in commerce at livestock auction markets within the State of Washington, shall cease and desist from:

1. Participating in any group boycott, concerted refusal to deal, or any coercive action or device in combination, agreement, or arrangement with one or more packers or livestock buyers to effectuate terms or

conditions at any livestock auction market within the State of Washington relating to the purchase of livestock in commerce, or payment therefor.

2. Failing to conduct its buying operations in competition with, and independently of, other packers and dealers similarly engaged.

This order shall become effective upon the passage of 35 days from service of a copy upon respondent subject, however, to the provisions that apply in the event of an appeal to the Secretary (9 CFR §§ 202.16 and 202.18).

Done at Washington, D.C.
January 25, 1977

s/_____
Victor W. Palmer
Administrative Law Judge

Supreme Court, U.S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-347

In the Supreme Court of the United States

OCTOBER TERM, 1980

DE JONG PACKING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Secretary of Agriculture correctly determined that petitioner engaged in an "unfair" practice, in violation of 7 U.S.C. 192(a), by participating in concerted action with other meat packing companies intended to compel livestock auction markets to accept unfavorable terms of trade.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-46) is reported at 618 F.2d 1329. The opinion of the Judicial Officer of the Department of Agriculture (Pet. App. C-1 to C-119) is reported at 36 A.D. 1181. The opinion of the administrative law judge (Pet. App. D-1 to D-63) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1980. A petition for rehearing was denied on June 3, 1980 (Pet. App. A-1 to A-2). The petition for a writ of certiorari was filed on September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), provides:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; * * *.

STATEMENT

1. Petitioner De Jong Packing Company is a meat packer doing business in the State of Washington (Pet. App. C-6 to C-8). Petitioner and other meat packing companies are the major purchasers of

slaughter cattle at livestock auction markets in the northwest portion of the state (*id.* at C-12). Traditionally, cattle have been sold at these auctions (and other livestock auctions throughout the United States) on an "as is" basis. When cattle are purchased on an "as is" basis, the purchaser obtains them without any warranty that they are suitable for a particular purpose and thus bears the risk of subsequently discovered defects (*id.* at C-9 to C-10). Under regulations of the Department of Agriculture in effect during the period of time relevant to this proceeding, the purchaser was required to pay for cattle within one business day, unless otherwise agreed. 9 C.F.R. 201.43(b) (1977).

In February 1972, petitioner and nine other packers sent a joint letter to the livestock auction markets in northwest Washington (Pet. App. C-13 to C-14). The packers announced in the letter that they would henceforth purchase slaughter cattle only on the condition that the animals be fit for human consumption, as determined by subsequent inspection (*id.* at C-35 to C-36). The packers further announced that they would pay for cattle three days after the date of their auction bid and that no payment would be made for cattle that failed inspection (*ibid.*). The packers stated that they were taking this action to reduce losses resulting from the purchase of cattle that later proved to be unfit for human consumption (*ibid.*).

Several of the auction markets refused to accept these terms (Pet. App. C-14 to C-16). Moreover, the Packers and Stockyards Administration informed the packers that their concerted action violated the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, and that administrative action would be taken unless the packers rescinded their plan (Pet. App. C-16 to

C-17). Following this warning, none of the packers except petitioner attempted to buy cattle on a contingent basis; they continued to purchase cattle on an "as is" basis except for animals having visible defects (*id.* at C-17). Petitioner, however, adhered to the plan, and on eleven occasions refused to pay for cattle that subsequently failed government inspection (*id.* at C-18 to C-19). In each instance, the auction market was forced to bear the economic loss (*id.* at C-19 to C-20). The Packers and Stockyards Administration again notified petitioner that this conduct violated the Act (*id.* at C-20 to C-21).[1]

In April 1974, petitioner sent notices to all northwest Washington livestock markets that it would purchase cattle only on the terms specified in the prior letter sent jointly by the packers (Pet. App. C-22 to C-38). During the same month, three other Washington packers sent letters imposing substantially identical terms upon the auction markets (*id.* at C-22 to C-24, C-38 to C-41). A meeting was then held by the auction market owners, area farmers, national marketing association officials, and federal and state agriculture officials (*id.* at C-24 to C-25). Following that meeting, the auction markets notified the packers that they would not accept their terms (*ibid.*). In response, the packers refused to purchase any cattle at the auctions between May 1 and May 15, 1974 (*id.* at C-26 to C-28).[2]

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[1] The State of Washington also commenced an administrative proceeding leading to an order requiring petitioner to pay three of the auction markets for the cattle (Pet. App. C-21). A Washington state court reversed the administrative order, and the State did not appeal (*id.* at C-22).

[2] The packers later resumed their regular purchases on an "as is" basis (Pet. App. C-28 to C-29).

2. In January 1975, the Packers and Stockyards Administration commenced an administrative proceeding charging that petitioner and ten other packers had violated the Packers and Stockyards Act, 7 U.S.C. 192. The charges against six of the packers were resolved by default, consent decree, or dismissal (Pet. App. C-2). Following a hearing, the administrative law judge held that petitioner and four other packers violated the statute because they had engaged in a group boycott and a concerted refusal to deal with the auction markets (*id.* at D-40 to D-41). Petitioner was also found to have violated 9 C.F.R. 201.43(b) (1977) by refusing to pay for cattle that it bought within one business day (Pet. App. D-41). Petitioner and the four other packers were ordered by the administrative law judge to cease and desist from participating in a group boycott, concerted refusal to deal, or any other coercive action in combination with other packers to compel acceptance of terms of trade at a livestock auction market in Washington (*id.* at D-61 to D-69). Petitioner was also ordered to pay for cattle within one business day except as otherwise permitted by regulation (*id.* at D-62). On appeal to the Secretary of Agriculture's Judicial Officer, the findings of violation were sustained. The Judicial Officer expanded the cease and desist order to make it commensurate with the operations of the respondent meat packers and also required all of the packers to comply with the prompt payment regulation (*id.* at C-117 to C-119).

3. Petitioner and two other packers then sought review in the court of appeals pursuant to 7 U.S.C. 194. The court of appeals affirmed the administrative order, holding that the concerted actions of the packers constituted an unfair practice in violation of 7

U.S.C. 192 and that petitioner and the other packers violated 9 C.F.R. 201.43(b) (1977) by refusing to tender prompt payment (Pet. App. B-1 to B-46). The court held that there was substantial evidence to support the administrative finding that the packers had engaged in concerted action to compel changes in the terms and conditions of livestock purchases at the auction markets in 1972 and 1974 (*id.* at B-7 to B-13).[3]

In sustaining the administrative order in this case, the court of appeals observed that the conduct of the packers was substantially identical to the conduct condemned by this Court in *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930), and *United States* v. *First National Pictures, Inc.*, 282 U.S. 44 (1930). The court of appeals explained that here, as in *Paramount Famous Lasky* and *First National Pictures*, "a group of competitors have joined together for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces" (Pet. App. B-17 to B-18).[4] The court agreed with the Secretary that he had jurisdiction to curb "unfair" practices in their incipiency, before competitive harm has resulted (*id.* at B-20 to B-21). The court also recognized that the

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[3] The court of appeals set aside administrative findings that the concerted activity also violated 7 U.S.C. 192(e) and (g). See Pet. App. B-13 to B-14.

[4] The court recognized that "bidding for cattle on a 'subject' basis is perfectly legal, and that any packer acting independently is free to bid on such terms." The court explained, however, that a violation arose here because "concerted action" was used to impose the terms of trade (Pet. App. B-7).

Packers and Stockyards Act's prohibition of "unfair" practices is "broader than antecedent antitrust legislation" (*id.* at B-32), and "proscribes practices which the Sherman Act would permit" (*ibid.*).[5]

Judge Sneed dissented (Pet. App. B-34 to B-46), concluding that the administrative record in this case did not sufficiently demonstrate anti-competitive effects resulting from the challenged concerted activities. He would have remanded the case to the administrative agency for further consideration of that issue.

ARGUMENT

The decision of the court of appeals is in agreement with the decisions of this Court and the other courts of appeals that have construed the Packers and Stockyards Act. The decision rests entirely on the Act's prohibition of "unfair" practices in the meat packing industry, and, contrary to petitioner's contention, does not raise the question whether concerted refusals to deal affecting "non-price" terms are *per se* violations of the Sherman Act. Further review by this Court is therefore unwarranted.

1. Petitioner contends (Pet. 11-27) that the present case raises the question whether *Paramount Famous*

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[5] The court of appeals expressed no views on the question whether *Paramount Famous Lasky* and *First National Pictures* adopted a "rule of reason" or *"per se"* analysis in condemning the concerted activities there involved under the Sherman Act. The court stated that "[w]e do not find it necessary to decide that question here or to suggest which mode of analysis should apply under the Sherman Act." It also noted that conduct of the kind held improper in *Paramount* and *First National* would "clearly justify issuance of a cease and desist order under [the Packers and Stockyards Act]" (Pet. App. B-33).

Lasky Corp. v. *United States*, 282 U.S. 30 (1930), and *United States* v. *First National Pictures, Inc.*, 282 U.S. 44 (1930), require a "*per se*" or "rule of reason" analysis of group boycotts designed to affect "non-price" terms. However, the court of appeals expressly declined to reach that issue (Pet. App. B-33). Both *Paramount Famous Lasky* and *First National Pictures* were decided under the Sherman Act, 15 U.S.C. 1. As the court below correctly held (Pet. App. B-32), it is well settled that the Packers and Stockyards Act's prohibition of "unfair" practices (7 U.S.C. 192(a)) reaches beyond the prohibitions of the Sherman Act. See, *e.g.*, *Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Wilson & Co.* v. *United States*, 286 F.2d 891, 895 (7th Cir. 1961). See also *Stafford* v. *Wallace*, 258 U.S. 495, 513-515, 521 (1922). In enacting this remedial legislation in 1921, Congress observed that, if it "did not go any further than existing law on the subject, there would not be much use of enacting it * * *." 61 Cong. Rec. 1805 (1921) (remarks of Rep. Anderson). See also 61 Cong. Rec. 1805-1806, 1887-1888 (1921) (remarks of Reps. Anderson, Rayburn and Tincher).[6] In short, since the present administrative proceeding is not circumscribed by the standards of the Sherman Act,

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[6] The Packers and Stockyards Act's prohibition of "unfair" practices is no less expansive and perhaps even more expansive than Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. *Swift & Co.* v. *United States, supra*, 393 F.2d at 253. This Court repeatedly has recognized under Section 5 of the Federal Trade Commission Act that the administrative agency may "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); see also *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953).

it presents no occasion for determining what elements of proof are required in Sherman Act suits.

2. The court of appeals correctly held that petitioner's participation in a group boycott to compel the acceptance of unfavorable trade terms was an "unfair" practice under 7 U.S.C. 192(a). The concerted actions of the packers in this case were designed to shift from themselves significant economic losses and to impose those losses on the stockyards and their suppliers. While the packers were free to negotiate for a change in trade terms on a unilateral basis or seek administrative relief, it was not permissible for them to engage in a group boycott to impose such a result. As this Court observed in *Stafford* v. *Wallace*, *supra*, 258 U.S. at 514-515, the very purpose of the Packers and Stockyards Act was to protect cattle suppliers from the unrestrained economic power of packers. This Court has also recognized that the remedial purposes of the statute are served by preventing packers from engaging in concerted refusals to deal. *United States* v. *American Livestock Co.*, 279 U.S. 435, 436-437 (1929). In view of these precedents and the Act's prohibition of any "unfair" practice, the Secretary acted within his statutory authority when he ordered the packers to cease and desist from engaging in concerted actions "for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces" (Pet. App. B-17 to B-18).[7] As the court of appeals correctly

[7] Although petitioner argues that the boycott in this case was intended to affect only a "non-price" term, the boycott substantially impinged on the stockyards' expected quid pro quo from their sales to the packers. As the Judicial Officer explained (Pet. App. C-51): "No one would even attempt,

concluded, the statute was enacted by Congress to halt unfair practices in their incipiency and no showing of actual competitive harm is required. See *Stafford* v. *Wallace*, *supra*, 258 U.S. at 520; *Swift & Co.* v. *United States*, *supra*, 393 F.2d at 253.[8]

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at this late date, to justify an agreement among competitors to pay $18 per cwt. for a certain type of slaughter cow. Why respondents think they can justify an agreement among themselves to pay zero dollars per cwt. for a certain type of slaughter cow (*i.e.*, one later condemned) is beyond comprehension." Cf. *Catalano, Inc.* v. *Target Sales, Inc.*, No. 79-1101 (May 27, 1980), slip op. 3-7.

[8] The Judicial Officer and Administrative Law Judge fully explained their reasons for concluding that the challenged practices were unfair and harmful (Pet. App. C-46 to C-55, C-59 to C-60, D-40 to D-47). The packers' actions are not exempt from the Act's prohibition simply because they were motivated by business considerations. The packers may pursue commercial advantages through independent negotiation, but not through group boycotts aimed at the imposition of contractual terms. As the judicial officer observed, "each group had valid business reasons for its position on the respective merits of 'as is' and 'subject' sales" (Pet. App. C-31). He also observed that "condemnation rates on slaughtered cattle in the State of Washington are not out of line with the rest of the United States * * * " (*ibid.*) and added that it is often impossible to determine whether the "farmer or the packer was responsible for the condemnation * * * " (*id.* at C-32).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

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